

ROMAN LAW.

A Systematic and Historical Exposition

OF

ROMAN LAW

In the Order of a Code.

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EMBODYING THE INSTITUTES OF GAIUS

AND

THE INSTITUTES OF JUSTINIAN,

TRANSLATED INTO ENGLISH BY

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P R E F A C E.

THE object of this work is to place before the English reader, in the form of a Code, the most original and not the least valuable portion of Latin Literature. In the Introduction the method of arrangement is explained, together with the reasons that make it expedient to depart from the plan of the Roman Institutional writers. The student, it is believed, will be greatly assisted by the uniformity of the new order of exposition.

Through the writings of Sir Henry S. Maine, the importance of considering Law in its historical aspect has been deeply impressed upon English students. In tracing the development of Legal Conceptions, the Roman Law, owing to the remarkable continuity of its history, possesses a singular value. In this treatise, accordingly, are set forth the chief steps in the progress of the Civil Law from the time of the XII Tables to the end of Justinian's reign—a period of nearly a thousand years.

For the convenience of students, a translation of the Institutes of Justinian, and (where any difference exists) of the Institutes of Gaius, is embodied in the text as part of the exposition. The passages taken from Gaius and Justinian are distinguished by a difference of type. It has not been deemed advisable to translate Latin technical

phrases by doubtful English equivalents. No one can hope to master the doctrines of the Roman jurists without some acquaintance with their technical language. It has therefore been thought best to familiarise the reader with the Latin terms by retaining them in the original, along with paraphrase or explanation. The text of Huschke has been almost invariably followed ; and as that is published in a cheap and convenient form, it has been determined not to print the Institutes in Latin.

On the obscure and difficult topic of the relation of Possession to Ownership a theory is broached that throws an interesting light on the history of the Roman Law of Property. On another subject—the history of Contract and the connection of Contract with Property—an account is given that differs from the opinions of several distinguished jurists. This difference has led to a new statement of the principles and history of the Roman Law of Contract.

The services of Mr. J. Morrison Davidson, of the Middle Temple, in revising the translations and proof-sheets of the first two Books, require grateful acknowledgment.

INTRODUCTION.

IN every progressive country a time comes when the law attains such dimensions, that attention is earnestly given to the consideration of judicious arrangement as a means of lightening the burden on the understanding and the memory. In dealing with this problem at the present day, we have the advantage of watching the experiments in classification made by the students of natural science. It is true that the particular classification adopted in zoology, botany, chemistry, or mineralogy cannot be directly copied; but the experience gained in those subjects is of value in guiding us to the principles of sound classification. "The ends of scientific classification," says Mr. J. S. Mill (*Logic*, vol. ii. p. 264), "are best answered when the objects are formed into groups, respecting which a greater number of general propositions can be made, and those propositions more important, than could be made respecting any other groups into which the same things could be distributed." This is a fair statement of the merits of a classification that is really scientific, as distinguished from one that is merely logical. It would express the difference between the natural system of De Candolle in the arrangement of plants and the artificial system of Linnaeus. Pure logic is satisfied if the groups into which things are divided are distinct, and if they embrace all the objects; but a good classification ought to aim at more, and to arrange the objects in groups where the points of resemblance are numerous and important.

The classification adopted in this work may be understood

from a consideration of the subject-matter of law. The subject-matter of law is commands—general rules intended to govern men in their conduct towards each other. “Law” may be defined sufficiently for the present purpose as a command of the Sovereign to all persons in given circumstances to do or not to do something, which persons will be visited with some evil by the Sovereign if they disobey. But in the Civil Law, we are concerned with a particular class only of such commands; namely, those in which the command is made in the interest of some specified individual or individuals, who thereupon are said to have a right to insist on the performance of the command. Thus if A has agreed with B to sell him a house, A may be said to be commanded by the Sovereign to perform his agreement, subject to the evil, if he fails to do so, of giving compensation to B. A is said to be bound or to be under a *Duty* to deliver the house, and B is said to have a *Right* to the delivery. In the Civil Law, Duty and Right are correlative terms. No Duty is imposed except in the interest of some specified person, who thus has a Right, and no Right can exist except by imposing on another some Duty.

The subject-matter of the Civil Law may thus be described as Rights and Duties. If now a Duty is not performed, by what means may the person having a Right to performance obtain redress? The answer to this question is to be found in the topic of Civil Procedure. Every State that has law worthy of the name must necessarily possess a judicial machinery, by which the existence of disputed rights may be determined, and redress given when a duty is not performed. Hence emerges the first main division. The Roman Law of Procedure occupies Book IV.

The leading divisions of Rights and Duties must be sought in their most elementary characteristics. The object of law is to prevent harm and ensure benefits. The acts forbidden by law are, or are supposed to be, noxious; the acts required are, or are supposed to be, beneficial. Now it is manifestly easier to prevent harm than to promote good. It is easy to say, “Thou shalt not kill;” it is harder to say, “Thou shalt save

from death, if it be in thy power." In moral guilt there may be little difference between the man that pushes another into deep water, and the man that, seeing him there in danger of drowning, refuses to admit him into his boat; but in law, between those men lies the gulf that separates innocence from the gravest of crimes.

In making a distinction between Acts and Forbearances, we touch upon something that has a practical, as well as a logical, value. The State entertains no difficulty in requiring *all* men universally to forbear from doing harm; but it seldom ventures to impose on men generally the duty of rendering services. All men must "not kill;" but only parents and guardians or specified individuals are bound to preserve the life of others. This is a type of many cases. Duties to forbear bind all men generally; duties to do are imposed on specified individuals, and for the most part not without their own consent. Some few duties to forbear (generally or always of the nature of forbearance to exercise a Right) are imposed on specified individuals only. We may thus divide Duties (and by implication Rights) into two classes.

I. Duties binding all men generally. These are always Duties to forbear, or Negative Duties.

The correlative Rights are called Rights *in rem*.

II. Duties binding specified individuals only. These are nearly always Duties to do, or Positive Duties. Sometimes, however, they are Negative Duties.

The correlative Rights are called Rights *in personam*.

The phrases *in rem* and *in personam* are used by the Roman jurists in an analogous sense. They did not possess the words Right and Duty, nor the analysis expressed by those words. They employ the phraseology chiefly in the case of actions, as in the following passages:—

An action is nothing else but the right to follow up by legal proceedings what is one's due. (J. 4, 6, pr.)

It remains to speak of actions. If now we ask how many kinds of actions

there are, it seems true to say there are two, *in rem* and *in personam*. Those that have said there are four—a number reached by bringing in the kinds of *sponsiones*—have not observed that they have brought some species of actions in among the kinds (*genera*). (G. 4, 1.)

Of all actions in which a question between parties is raised on any matter before judges or arbiters, the chief division is into two distinct kinds, namely, *in rem* (for a thing), and *in personam* (against a person). (J. 4, 6, 1.)

The actions a man brings against a person under an obligation to him, either by reason of contract or of wrong-doing (*ex maleficio*), are actions *in personam* given to meet the case. In them he alleges in his statement of claim that his opponent ought to give or do [or furnish] something, or he puts it in certain other ways. (J. 4, 6, 1 ; G. 4, 2.)

An action is *in rem* when we allege in the statement of claim either that a corporeal thing is ours, or that we may avail ourselves of some right—of use or usufruct, for instance ; of passing, driving beasts, or leading water ; or of building higher, or of prospect. The opponent, again, has a negative action quite the other way. (G. 4, 3.)

An action may be brought against a man that is under no legal obligation, but against whom some one is moving about something in dispute. In this case the actions that are given are *in rem*. If, for instance, a man is in possession of some corporeal thing which Titius affirms is his, and the possessor says he is owner, then if Titius alleges in the statement of claim that it is his, the action is *in rem*. Similarly, if a man brings an action to assert a right he claims over a thing—a farm for instance, or a house, or a right of usufruct, or of passage over a neighbour's farm, or of driving beasts, or of leading water from a neighbour's farm—the action is *in rem*. The action to assert a right to landed estates in town is of the same kind ; as when one brings an action to assert a right he claims to raise his house higher or to a prospect, or to throw out anything, or to run a beam into a neighbour's house. On the contrary, too, return actions have been given in regard to usufruct and servitude over landed estates both in country and in town ; so that a man can allege in his statement of claim that his opponent has not a right to a usufruct, to pass, to drive beasts or lead water, and again to build higher, to have a prospect, to throw away something, to run in a beam : these actions too are *in rem*, but negative. An action of this kind is not given in disputes about corporeal things. In them the plaintiff is the man not in possession ; and the man in possession has no action given him by which he can deny that the thing is the other's. One case no doubt there is in which the man in possession none the less comes to play the part of plaintiff, as will appear more fittingly in our larger book, the Digest. (J. 4, 6, 1-2.)

• Actions *in rem* we call *vindicationes* (claims to a thing): actions *in*

personam, in which it is alleged in the statement of claim that one ought to give or do something, are called *condictiones*: (J. 4, 6, 15; G. 4, 5.)¹

Rights *in rem* correspond to Universal, Negative Duties. They may be divided into three classes. In the first class, the Duties may be expressed in the general form, "Thou shalt not harm *any free man*;" in the second, "Thou shalt not harm or take away the *persons* that are his;" and in the third, "Thou shalt not harm or take away the *animals and things* that are his." The rights that a freeman has to himself differ from the rights he has to the persons that belong to him, and these again from his rights to the animals and things that belong to him.

The first class, then, of Rights *in rem*, are the Rights that a

¹ In an *actio in rem*, no Duty is alleged against any specified person; but the plaintiff simply alleges a Right in himself. In an *actio in personam* a breach of Duty was alleged against a specified individual. Thus an *actio in rem* positively affirmed a right, and by implication indicated a duty binding on all men generally.

Every *actio in rem* is a remedy for a right *in rem*; but every *actio in personam* is not used to enforce rights *in personam*. Delicts, which are violations of rights *in rem*, are pursued by *actiones in personam*. (See p. xxxvi.) It is to the fact that the Romans looked at the distinction expressed by the words *in rem* and *in personam* from the point of view of *actiones* and not of Rights, that some of the most marked peculiarities of their classifications are to be attributed. An undue prominence was thus given to the accidental forms of pleading.

A few other examples of the expressions *in rem* and *in personam* may be cited. Agreements (*pacta*) might be either *in rem* or *in personam*. (D. 2, 14, 7, 8.) Thus if I, a creditor, agree "not to sue," the debt is extinguished, and neither the heirs of the debtor nor his sureties can be troubled. But if I agree "not to sue the debtor, Lucius Titius," it is open to me to sue his sureties; or, if it was so understood, his heirs. (D. 2, 14, 57, 1.) Lucius Titius is a specified individual, and an agreement in favour of him alone is said to be a *pactum in personam*; on the other hand, an agreement generally in favour of all persons that are liable is called a *pactum in rem*.

When a creditor applied to be put in possession of the goods of his debtor, the benefit of the act accrued to all the other creditors, and the goods when sold were divided among them. The bankruptcy (*missio in possessionem*) was said to be allowed not for the benefit of the applicant alone (*personae solius potentis*), but to be general (*in rem*), in favour of all having claims against the debtor. (D. 42, 5, 12, pr.)

A contract or other transaction was made void equally by force or fraud. But there was a difference between them. A contract obtained by the fraud of the creditor was void; but it was not void if the fraud were by any one else. But a contract procured by force was void, by whomsoever the force was exerted. The edict making the exercise of force by all men without distinction a reason for invalidating a contract was said to be *in rem*. (D. 4, 2, 9, 1; D. 43, 24, 5, 13.)

Under an edict of the Praetor, any one threatened with injury by any alteration of a building or construction could formally prohibit the change, and the person making the change could not then proceed until he had obtained the authority of the Praetor. This prohibition was called *nuntiatio operis novi*. As it was a general prohibition to all who might seek to do what was forbidden, it was said to be *in rem*. (D. 39, 1, 10.)

free man has in respect of his own personality—such as his right to life, liberty, immunity from wilful harm, and to his good name. What, for example, is the meaning of a “right to liberty”? It means that all men are bound to abstain from interfering with a man’s freedom of action, except in the cases where such constraint is authorised by law. This duty is negative; it is a duty to forbear; and it binds all men generally. The right to freedom is therefore a right *in rem*. One characteristic of these rights is worthy of remark. Not only the Duty but the corresponding Right is universal—among free men. All men have such Rights; all men owe these Duties. They are Duties owing *by all men to all men*. The corresponding Rights are universal and primary. Without these Rights no others could exist. A man that had not a Right to himself could not have a right to anything else. Such Rights, moreover, precede others not only in a logical but also in a historical order. On every ground, therefore, as the simple, elementary, primordial rights of men, these deserve the first place in a scheme of classification.

The second group, of which the most striking example is Slavery, consists of those Rights *in rem* that a free man could have over other human beings. A slave owed his master no Duties (p. 14). As against the slave, the master had no Rights. But as against all the world he had rights in respect of the slave, for all men generally were bound not to harm or take away the slave from the master. In what respects the rights of a master over his slaves differed from his rights to his ox, or to any other article of property, will duly appear. It is enough here to say that there are sufficient reasons for separating the group that consists of Slavery, *Potestas*, *Manus*, *Mancipium*, from Ownership, to which in most points it is very closely allied.

The third group of rights *in rem* corresponds with Property in the widest sense.

Rights *in personam* are divided not according to their objects, but in respect of their origin. Most Positive Duties are imposed on individuals only with their consent; in other words, by Con-

tract. In a very few cases, duties are imposed on persons without their express consent, but under circumstances where, if their consent may not be presumed, it at least, in fairness, ought to be given. These cases are known under the name of QUASI-CONTRACT. In other cases, Duties are imposed upon persons without regard to their consent, as in the case of Patron and Freedman, Parent and Child, and *Tutela*. For these cases I have ventured to employ the term "STATUS,"—a word that in jurisprudence has been much given to wandering at large, and may now, without impropriety, be assigned to a useful and unoccupied position.

In all the groups that are included in the present work under the foregoing divisions, it may be said that each species either consists wholly of one kind of Rights (*in rem* or *in personam*), or consists of one kind of Rights in so predominant a degree that no difficulty arises. But a very extensive and complex topic remains outside both categories. If mere logical distinctions were to be pedantically adhered to, the subject of INHERITANCE would be taken under Rights *in rem*. The right of an Heir in the Roman Law was a Right *in rem*, and both theoretically and practically was dealt with as a kind of property. But Inheritance has a peculiarly complex and distinctive character. It includes Rights both *in rem* and *in personam*; and not merely Rights, but Duties or liabilities. While, therefore, it must be taken as a distinct group if placed under the head of Rights *in rem*, there is an inconvenience in taking it up before the consideration of Rights *in personam*. The simple ought to go before the complex, and the separate groups of rights should be discussed before entering on so complicated a form of succession as Inheritance. Legacy, as a mode of acquiring individual rights, ought in strictness to appear in Book I. and Book II. as an Investitive Fact. But Legacy cannot be discussed except after Wills; and in the Roman Law, the proper place for Wills is among the Investitive Facts of Inheritance. Legacy must unavoidably be taken after Inheritance.

In dividing a subject, we come at last upon groups that cannot with advantage be further subdivided. In the Table of

Contents these groups are printed in capitals.¹ In conformity with the plan of the present work, each group is distinguished by the special Rights or Duties that characterise it. In determining what shall be species, little difficulty occurs: a comparison of the Table of Contents with the order followed by Gaius and Justinian will show that to a great extent the task of an expositor is simply to take out what is implicitly, although obscurely, in the text-books.

But in the order adopted for expounding the groups or species, this work introduces a plan not hitherto followed by law books, nor even by treatises on natural science, where the conceptions of scientific arrangement have been most fully carried out. Professor Bain (*Logic of Induction*, p. 248), in pointing out the defects of writers in the natural sciences, makes the following pertinent observation:—"In chemistry, no less than in the natural history sciences, a *regular and uniform plan in the descriptive arrangement* is more than an aid to memory; it is, further, an instrument of investigation." In the following exposition two rules have been observed—(1) That the order of exposition should be uniform; that in whatever manner we arrange the details of one group, we should arrange the details of all other groups; and (2) that the details under each group should be arranged in divisions that shall be exhaustive and mutually exclusive. Uniformity is at once the merit and the test of a classification. If the groups are selected on a sound principle, they must admit of uniform exposition; if they admit of uniform exposition, they must have been selected on a sound principle.

In the present state of Comparative Jurisprudence, a sound and uniform system of exposition has a special importance. Much of the future progress of the scientific study of law must be sought in a comparison between the laws of different countries. The presence or absence, the fulness or scantiness of particular topics of law, gives a ready measure of the difference between two states of civilisation. Thus,—to take

¹ Those printed in italic capitals were obsolete in the time of Justinian, or were actually abolished by him.

the division of Rights *in rem* in respect of other human beings, and comparing the age of Gaius with Justinian, we have to remark the disappearance of three forms (*Manus*, *Mancipium*, and *Tutela Mulierum*). Comparing, again, the Institutes of Justinian with English law, we observe that other two (Slavery, *Potestas*) also disappear. Take again *Status*. The relation of patron and freedman disappears in modern law, but the other branches are more fully represented in modern than in Roman law. The meaning of this change appears at a glance. It is, that the old relation of *ownership* has given way to one of *reciprocal duties*. Again, the chief contents of the Law of Inheritance would find a different place in a modern code, and we should thus avoid the inelegance of treating Legacy as an appendage to Universal Succession: but it would not be possible to give a more just and vivid idea of the character of Inheritance in the Roman Law, than by assigning to it a distinct and peculiar place.

The order of exposition followed is expressed by the several classes,—(I.) DEFINITION; (II.) RIGHTS AND DUTIES; (III.) INVESTITIVE FACTS; (IV.) DIVESTITIVE FACTS; (V.) TRANSVESTITIVE FACTS; (VI.) REMEDIES. The nature of this division will be easily understood from an example, say the *potestas* enjoyed by fathers over their children.

The *potestas* is a group under the sub-class of Rights *in rem*. The first question naturally is, what is the meaning of it? The answer is in the DEFINITION. The full scientific definition of *potestas* would include a statement not merely of the points on which it differs from other kinds of Rights *in rem*, as Slavery or *Manus*; but an enumeration of the Rights of the father over the son, and the Rights, if any, of the son against the father. But advantage may be taken of a very convenient distinction adopted by Mr. Mill in his Logic (vol. I. p. 155) to define *potestas* in a less exhaustive and more summary manner. In the "definition," then, of a group, is given not a complete statement of the essence of a species, but only as much as is necessary to distinguish it from other groups in the same class, while a separate division is assigned to the enumeration of RIGHTS AND DUTIES.

When the nature of the *potestas* and the rights and liabilities of the father are understood, the next question is, How is this group of Rights and Duties created? How does a person acquire over another the rights summed up in the word "*Potestas*"? The answer to this question is given in the words used by Bentham, "INVESTITIVE FACTS." The term is not quite satisfactory. We may speak of investing a man with a Right, but not so well of investing him with a Duty. But although the association connected with the word implies an acquisition of gain, there is decided convenience in using the same word, whether the question is of Rights or Duties, or both.

Corresponding to the Investitive Facts are the facts that extinguish the *potestas*. By what means may a person be released from subjection to the *potestas*? To this question the answer is, the DIVESTITIVE FACTS.

There remains a third class of facts, at once Investitive and Divestitive. Of this nature is Adoption. When a person transfers the rights he has to another, the transfer divests him of the *potestas*, and invests that other with it. This is quite distinct from the creation or extinction of the *potestas*. A new descriptive term is wanted, and after the analogy of the other words, "TRANSVESTITIVE" has been coined for the purpose.

After examining the Rights and Duties expressed by the word *potestas*, and the circumstances under which such rights may be created, extinguished, or transferred, we come at last to a consideration of the REMEDIES applicable to the foregoing Rights and Facts. By Remedies, a full account of the Procedure to vindicate rights is not intended; but only a brief statement of the special actions applicable to the several groups, with any facts peculiar to them.

These divisions, while manifestly distinct, are also exhaustive. Every rule of law relating to any group may be introduced under one of the divisions, and cannot be placed in more than one. Moreover, the divisions correspond with practical wants. A father, for example, or a *tutor*, desires to know his Rights and Duties. The information is at once open

to him, and he need not trouble himself about Investitive or Divestitive Facts or Remedies. Another person, again, wishes to know whether he is a *tutor*, or how he may avoid the office. He must look to the Investitive or Divestitive Facts, and he need not concern himself with the Rights and Duties or Remedies. The Remedies would never be consulted except when a dispute arose and the parties contemplated litigation. A Code drawn up on this arrangement would thus be adapted to the wants of different classes of persons. Again, this arrangement facilitates comparison. The rights of a master over his slaves may be at once compared with the rights of a father over his children, and of a husband over his wife *in manu*; and these again with the reciprocal obligations of parent and child in the absence of the *potestas*, and of husband and wife in the absence of *manus*. In like manner the Investitive Facts and Divestitive Facts may be compared, and when these are enumerated in historical order, singular light is often thrown upon the character of Roman institutions.

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¹ In the Table D. means Definition.

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CRITICISM OF THE ORDER OF GAIUS.

The Institutes of Justinian, following the Institutes of Gaius, adopt a threefold division of the Civil Law, under the names PERSONS, THINGS, and ACTIONS.

This division has an appearance of logical exactness. A "person" is not a "thing," while both again are distinguished from an "action" or civil process. In so far as the topic of "actions" corresponds, and to a great extent it does correspond, with the head of "Civil Procedure," the division is both logical and sound. The other part of the division, it is worthy of remark, proceeds not upon the character of Rights and Duties, but upon the subjects (persons) or the objects (things) of Rights and Duties. But law is not concerned with Persons or Things in their physical and other qualities; it has to do with them only in so far as they are subjects or objects of Rights and Duties. A classification, therefore, proceeding upon a distinction between "persons" and "things," is almost inevitably superficial.

"Thing" is a name generally for any object that can be apprehended by the senses, and chiefly the objects of touch. But in this sense the term would not serve the purpose of Gaius. Is a contract a "thing"? If not, how is Contract to be made a department of the law concerning "things"? This difficulty was overcome in appearance by giving to the word "thing" a very wide definition. "Things" were said to be either corporeal or incorporeal. Corporeal things are things that can be touched; but by incorporeal things the jurists did not mean such things as soul, spirit, light, heat, &c.; they meant purely fictitious things. Incorporeal things were mere legal entities (*quæ in jure consistunt*), such as usufruct, inheritance, *obligatio*. But these are not "things" in the ordinary acceptation of the term; they are bundles or aggregates of Rights and Duties. Things are thus divided into two classes:—

(1.) Corporeal things.

(2.) Inheritance, usufruct, and other legal aggregates.

Obviously this division is apparent, not real. We might as well divide animals into—(1) Vertebrata, and (2) Animal functions. But an examination of the Institutes shows that the division of "corporeal things" had really as little to do with "things" as the other division of "incorporeal things." What was really discussed under the head of "corporeal things" was Ownership (*dominium*). The apparent classification is absurd, but the apparent is not the real classification, and the real classification admits of some justification. Practically we find that the law of Property (in the widest sense, as including usufruct, servitudes, &c.), the law of Inheritance, and the law of *Obligatio*, are strung together and connected by the irrelevant idea of "things." Nominally the division proceeds upon "things;" really it stands on the more solid ground of the nature of the Rights and Duties in the several groups.

If a cursory view of the topics included under the Law of Things shows that the term "thing" does not really express attributes common to the chief subdivisions, further inquiry reveals that the apparent antithesis between "thing" and "person" is equally worthless. The division may be thus stated:—

Law. { 1. Law concerning Persons.
 { 2. Groups of Rights and Duties.

Here, again, there is no real opposition between the two divisions of law. The law concerning Persons consists of groups of Rights and Duties; and the

groups of Rights and Duties necessarily relate to Persons. There is, however, more coherence in the "Law concerning Persons" than there is in the "Law concerning Things." We may even go so far as to say that it was the comparative unity and cohesion of the law concerning persons that suggested the antithesis of "law concerning things," which really has no other bond of union than that it is not the "law relating to persons."

The topics considered under the law relating to "persons" are slavery, *potestas*, *manus*, *mancipium*, and *tutela*. These subjects had, in the early Roman Law, a certain degree of connection that might have justified their being grouped in one class, although that class is most inaptly named by the word "persons." The subjoined Table will assist in making this point clear.¹

If we omit the class of Freedmen (which introduces a cross-division) and add the class of persons that are at once *sui juris* and not under any form of guardianship, we get a curiously exact and exhaustive classification of Persons. If the citizens of Rome had been assembled, they could all have been arranged in the classes. Each would have found a place in one class, and no person would have been entitled to go into two classes. Thus, if a man was ranked as a slave, he could not appear in any of the subsequent classes; if a person were under *potestas*, he could not be in any of the other classes; and so on throughout. There is, however, a more substantial ground for connecting the topics of the "Law concerning Persons." Slavery, *potestas*, *tutela*, &c., are examples of subordination. The law of persons contains an account of the different species of authority to which a person in Rome might be subjected. These facts point to a much closer connection between the various groups brought under the Law of Persons than is found to exist in the Law of Things. But the case does not end there. Whether a person was subject to one of the kinds of authority, was a question of the utmost consequence in the practice of the law. A slave or other person subject to authority laboured under numerous legal disabilities, and naturally the first question that suggested itself to a legal adviser was whether his client or the opponent was under one or other of the species of authority. The first books of Gaius and Justinian are occupied with a statement of the rules for determining whether a given person was in slavery, or under *potestas*, or *tutela*, &c.

But while it is easy to understand or even approve the plan of Gaius in giving such prominence to the law of Persons, it is a different question whether in a modern exposition of the Roman Law it is necessary or wise to follow his example. What seems a fatal objection is, that if the order of Gaius be adopted, it leaves no

¹ Men—

(I. Slaves,

Freedmen,

(II. Free,

{ 1. Roman Citizens.
2. *Latini Juniani*.
3. *Dedititii*.

A. Slavery.

{	1. Persons <i>alieni juris</i> ,	B. <i>Potestas</i> .
				C. <i>Manus</i> .
				D. <i>Mancipium</i> .
				E. <i>Tutela Mulierum</i> .
				F. <i>Tutela Impuberum</i> .
{	2. Persons <i>sui juris</i> ,	G. <i>Cura</i> .

principle upon which the rest of the law may be arranged ; for, as has been just pointed out, no like principle is to be found in the idea of "things." Again, it is worthy of notice from the standpoint of Comparative Jurisprudence that the "Law concerning Persons" was a decaying branch of the law. Out of the seven groups described by Gaius, three disappeared before the time of Justinian ; and if we look to modern law, we find that two out of the remaining four—namely, slavery and the *potestas*—have vanished. No writer would now dream of beginning a treatise on law with Guardianship—the sole surviving representative of the ancient "Law concerning Persons."

When the blanks in the exposition of Gaius are filled up, it appears that the groups collected under the head "Persons" fall into two divisions. The first group consists of relations resembling, although not in every point, Ownership. These are slavery, *potestas*, *manus*, *mancipium*. These several species are characterised by common attributes of marked importance, in regard to the constituent Rights, and also to the Investitive and Divestitive Facts and Remedies. On the other hand, the relations of patron and freedman, of parent and child (in the absence of *potestas*), of husband and wife (in the absence of *manus*), and of *tutela* and *cura*, are distinguished by reciprocity of rights (the antithesis of Ownership), and by other circumstances that make it necessary to put them in a distinct class. They belong to the division of Rights in *personam*, and in the present work the sub-class they form is called *Status*.

The law concerning things as expounded by Gaius contains three main divisions. The first deals with Ownership (in the widest sense), and corresponds with the head "Rights in *rem* in respect of Animals and Things." That division, therefore, may be passed over without further remark. The other two divisions are Inheritance and *Obligatio*. The following passage gives a clue to the arrangement of Gaius and Justinian :—

So much must suffice in the meantime about acquiring single things : for the law of legacies, by right of which you acquire single things, as well as that of trusts when single things are left you, we will bring in more fitly further down. Let us see now, therefore, in what way in which you acquire things *per universitatem*. If then you are made a man's heir, or claim *bonorum possessio*, or if you adopt a man by *arrogatio* [or receive a woman as your wife *in manu*], or if a man's goods have been made over to you in order to uphold the grants of freedom to slaves, in that case all that is his passes over to you. First, let us look narrowly at inheritances : these are of two kinds, for they belong to you either under a will or by way of intestacy. First, let us look narrowly at those that come to you under a will. In this it is necessary at the outset to set forth how wills are drawn up. (J. 2, 9, 6 ; G. 2, 97-100.)

The place of Inheritance is determined by an accident. Gaius having undertaken to treat of "things," after describing the law of Property, remembers that things may be acquired *per universitatem* as well as individually. The error becomes at once manifest when we remember that by "things" what Gaius really describes is the law of Property. Doubtless Inheritance may be viewed as a mode of acquisition, but if so, we must bear in mind that it includes the acquisition of Duties as well as of Rights.

But for the error made in regard to the class of "things," Gaius would almost certainly have taken up the simple topic of "*obligatio*," before entering on the most complex and difficult division of the whole law.

The last division, *Obligatio*, is introduced as an "incorporeal thing." Obligations are divided by Gaius into two, by Justinian into four species. Gaius gives contract and delict; Justinian adds quasi-contract and quasi-delict. The distinction between contract and quasi-contract has been already set forth. There is no corresponding, or in fact real difference, between delict and quasi-delict. The distinction is merely historical. The delicts are the old delicts; the quasi-delicts are the new delicts introduced by the Praetor's edict. But what is there in common between Contract and Delict? Why should they be taken together as branches of the larger division of *obligatio*? In the Roman Law the connection between them was that they formed the two subdivisions of *actiones in personam*. In the statement of claim it was alleged that the defendant ought to do or pay something. In an action, then, upon a contract or delict, the *formulae* were very similar, while both stood in marked contrast to the *formula* in an *actio in rem*. It is easy to understand, therefore, why the Roman writers included Contract and Delict under the common designation of *obligatio*.

But a deeper analysis makes it very doubtful how far the connection in the Roman Law was anything more than accidental. For what is a Delict? An examination of the cases in the Roman Law shows that every delict was a violation of a right *in rem*. Why then should Contracts, which consist of rights *in personam*, be co-ordinated with Delicts, which are violations of the opposite class of rights *in rem*? The incongruity appears more strongly, perhaps, if the question be slightly varied. Why should actions for breach of rights *in personam* be co-ordinated with certain actions for breach of rights *in rem*, while the actions for breach of other rights *in rem* are placed in an entirely separate division?

The purely accidental character of the conjunction between Contract and Delict even in the Roman Law appears from the following considerations. Under the system of *formulae*, when there was a dispute as to the existence of any rights *in rem*, the proper remedy was by an *actio in rem*. But the history of Roman Law proves (pp. 820, 821) that there was a stage when such questions were determined in an *actio in personam*, and that there was a still earlier stage when the action was neither *in rem* nor *in personam*, but was framed to try the truth of an assertion. On the other hand, the breach of a right *in personam* might be the basis of an *actio in rem*. This was undoubtedly exceptional, and probably in the early history of the law would not have been allowed; but it was finally admitted. Thus, if a person deposited a ring with another, who, on demand being made, refused to give it up, the owner had the option of suing for breach of contract, or of bringing an *actio in rem* for the recovery of the ring as his property. (D. 6, 1, 9.) Thus, even in the Roman Law, the mere circumstance of two classes of actions being *in personam* is not a sufficient reason for co-ordinating them as subdivisions. It is conceived that the gain to clearness and an accurate understanding of law from discarding Delict as a separate subdivision, and distributing the various Delicts in their places as violations of rights *in rem*, is very considerable. This, at all events, is the arrangement pursued, after much consideration, in the present work.

PRELIMINARY CHAPTER.

THE first sections of the Institutes of Gaius and Justinian attempt an explanation of the most general ideas of Law. The effort was to a great extent frustrated by the weakness of the Roman jurists in the Philosophy of Law, and by the defects of their technical language.

EXPLANATION OF TERMS.

Jurisprudentia.

Law learning (*jurisprudentia*) is the knowledge of things divine and human, of the just and the unjust. (J. 1, 1, 1.)

Jurisprudentia is the abstract name corresponding to *Jurisprudentes*, who were a class of men skilled in the law. Their exact position will presently be stated; but it may be observed that they were practical, as distinguished from philosophical or theoretical, jurists. Justinian's definition, which is taken from Ulpian (D. 1, 10, 2), was a rhetorical commonplace of the Stoic philosophers. Chrysippus, a distinguished Stoic, defined law as the Queen of all things, divine and human. (D. 1, 3, 2.) It is hardly necessary to say that the statement in the text has no scientific value.

Jus, Justitia.

Justice is the constant and perpetual wish to give each man his due. (J. 1, 1, pr.)

The precepts of law (*jus*) are these:—To live honourably, not to hurt another, to give each man his due. (J. 1, 1, 3.)

Jus generally means "law," as distinguished from *lex*, "a statute." It is used, however, in other ways. *In jure* means "in the court of the Praetor," the place in which justice is administered. Again, it is used vaguely in *jus cognationis vel adfinitatis* (D. 1, 1, 12) for the "tie of blood or affinity." Ulpian, again, says that *jus* is the art of distinguishing the good and the fair (*ars boni et aequi*). (D. 1, 1, 1, pr.)

Jus Publicum et Privatum.

In this study there are two parts, public and private. Public Law is what looks to the standing of the affairs of Rome; private law to the advantage of individuals. (J. 1, 1, 4.)

Elsewhere (D. 1, 1, 1, 2) we are told that Public Law is the law relating to sacred rites (*sacra*), to Priests and Magistrates. The distinction that seems to be intended by Justinian may perhaps be expressed with more precision from a different standpoint. Two kinds of cases come before legal tribunals. In one, private individuals seek redress from private individuals for evils affecting themselves; in the other,

persons sue or are sued not in their own behalf, but as representing the State or Sovereign. Causes are thus either (1) between private individuals or (2) between the Sovereign and private individuals. Public Law therefore embraces Ecclesiastical Law, Constitutional Law (including the Administration), and Criminal Law. The Institutes of Gaius and the Institutes of Justinian (with the exception of the short title at the end) are concerned exclusively with Private Law.

Jus Naturale, Jus Gentium, Jus Civile.

We must say, therefore of Private Law that it is threefold (*jus tripartitum*), for it is gathered from the precepts of the *Jus Naturale*, of the *Jus Gentium*, and of the *Jus Civile*. (J. 1, 1, 4.)

The *Jus Naturale* is what nature has taught all living things. That law is not peculiar to the race of men, but applies to all living things that are born in the sky, on the earth, or in the sea. Hence comes to us the union of male and female that we call matrimony, hence the begetting of children and their upbringing. We see indeed that all other living things as well are held to know that law. (J. 1, 2, pr.)

The *Jus Civile* and the *Jus Gentium* are distinguished in this way. All people ruled by statutes and customs use a law partly peculiar to themselves, partly common to all men. The law each people has settled for itself is peculiar to the State itself, and is called *Jus Civile* as being peculiar to that very State. The law, again, that natural reason has settled among all men, the law that is guarded among all peoples quite alike, is called the *Jus Gentium*, and all nations use it as if law. The Roman people therefore use a law that is partly peculiar to itself, partly common to all men. The nature of each severally we will set forth at the proper places. (J. 1, 2, 1; G. 1, 1.)

The laws of nature, indeed, that are observed equally among all nations, settled by a certain divine forethought, remain always firm and unchangeable. But those each State has settled for itself are usually changed often, either by the tacit consent of the people, or by another statute being passed afterwards. (J. 1, 2, 11.)

The *Jus Gentium* is common to all the race of men: for the requirements of actual life and the needs of men have led the nations of men to settle certain things for themselves. Wars indeed, and often captivity and slavery, have followed contrary to the *Jus Naturale*, for by the *Jus Naturale* all men from the beginning were born free. By this *Jus Gentium* also nearly all contracts were brought in, as purchase and sale, letting and hiring, partnership, deposit, loan, and countless others. (J. 1, 2, 2.)

The *Jus Civile* takes its name from each several State—that of the Athenians, for instance; for if any one wishes to call the statutes of Solon or of Draco the *Jus Civile* of the Athenians, he will not be mistaken. So, too, the law the Roman people use we call the *Jus Civile* of the Romans, or the law of the *Quirites* (*Jus Quiritium*) that the *Quirites* use; for the Romans are called *Quirites* from Quirinus. But whenever we do not add what State's law it is, we mean that it is our own law; just as when we say "the poet," and add no name, it is understood that among the Greeks it is the pre-eminent Homer, among us Virgil. (J. 1, 2, 2.)

To individual men, things come to belong in many ways. Of some things we become owners by the *Jus Naturale*, which, as we have said, is called

the *Jus Gentium*; of some by the *Jus Civile*. It is more convenient, therefore, to begin with the older law. Now it is manifest that the *Jus Naturale* is the older, since it was put forth by universal nature along with the actual race of men; whereas the rights under the *Jus Civile* began to be only when States began to be founded, magistrates to be elected, and written statutes to be enacted. (J. 2, I, 11.)

These passages state fairly the philosophy of Law as understood by the Roman jurists; and they throw light upon the ancient theory of a "Law of Nature," which has played so conspicuous a part in the political thought of Europe. Before criticising the theory of Natural Law, it is advisable at once to point out an ambiguity in the phrase *Jus civile*, or Civil Law. *Jus civile* as opposed to *jus gentium* is defined in the text; it means the peculiar local law of Rome. But this is not the only, or even the general use of the words. What the Roman jurists had chiefly in view when they spoke of *jus civile* was not local as opposed to cosmopolitan law, but the old law of the city as contrasted with the newer law introduced by the Praetor (*jus Praetorium*, *jus honorarium*). Largely, no doubt, the *jus gentium* corresponds with the *jus Praetorium*; but the correspondence is not perfect. The Law of Sale, for example, was not brought in by the Praetor, but it is part of the *jus gentium*.

If the definitions of the text be taken strictly—that *jus civile* is the law found in Rome and nowhere else, while *jus gentium* is the law found in Rome and everywhere else—it will appear that the great bulk of the Roman Law belonged to neither category. There is very little, if any, of the old law that cannot be matched by similar laws in other countries; and if again we look for any institution of law that is to be found in every State, we must either admit vague generalities, or allow that scarcely a single rule of law is of absolutely universal application. The triviality of the distinction may be gathered from the instances given by Theophilus, one of the compilers of the Institutes of Justinian, and the oldest commentator on that work. As an example of *jus civile*, Theophilus quotes the rule of the Spartans not to allow aliens to settle in their midst, lest the institutions of Lycurgus should be depraved by contact with a foreign element. But the Spartans are not the only people in ancient and modern times that have exhibited a similar jealousy of aliens. Again he cites as examples of the *jus gentium* the punishment of death for murderers, criminal proceedings for adultery, and a pecuniary fine for theft. If it be said that these were probably good instances with the information possessed by Theophilus, then what is the worth of a generalisation that is liable to be upset with every fresh accession of knowledge?

The Roman jurists would probably have attached less importance to the distinction between Local and Universal Law, had it not been for the theory of a Law of Nature (*jus naturale*) adopted by them from the speculations of the Stoics. The supreme maxim of ethics was expressed by the Stoics in this form, "act according to Nature." A vague notion of the Universe as governed by law, on the moral as well as the physical side, led to the identification of the *jus gentium*, the general or universal element of law, with the *jus naturale* or Law of Nature. How feeble a hold the Romans had of the idea of Natural Law may be gathered from the instances quoted by Ulpian, who confounds the gratification of appetite with law. On one point only do the Romans seem to have opposed the *jus gentium* to the *jus naturale* in a case that redounds more to the credit of their good feeling than to the solidity of their speculative philosophy: they declared that slavery, although an institution of the *jus gentium*, was opposed to the Law of Nature. This barren declaration, however, seems to have exercised no appreciable influence in reforming the law.

SOURCES OF ROMAN LAW.

It is agreed that our law comes in part from what is written, in part from

what is unwritten ; just as among the Greeks, of laws (*νόμοι*) some are written (*ἑγγράφοι*), some unwritten (*ἄγγραφοι*). (J. 1, 2, 3.)

The division of the *jus civile* into two species seems not at all inappropriate, for its origin seems to flow from the institutions of two States; Athens, namely, and Sparta. In these States the usual course of procedure was this—the Spartans preferred to commit to memory what they were to observe as statutes ; but the Athenians guarded (only) what they found enacted in their written statutes. (J. 1, 2, 10.)

Written law includes statute (*lex*), decree of the commons (*plebiscitum*), decree of the Senate (*Senatus Consultum*), the decisions of the Emperors (*principum placita*), the edicts of the magistrates [that have the right to issue edicts], and the answers of learned men (*responsa prudentium*). (J. 1, 2, 3 ; G. 1, 2.)

From what is unwritten comes the law that use has approved ; for ancient customs, when approved by consent of those that use them, are like statute (*legem imitantur*). (J. 1, 2, 9.)

To these Cicero adds judgments at law (*res judicata*), and equity (*aequitas*). (Cic. Top. 5, 28.) Custom (*inveterata consuetudo*, *diuturna consuetudo*), as being, so to speak, collected from the informal suffrages of the people, had the force of law (D. 1, 3, 33) ; and in like manner laws might be repealed not merely by the legislature, but through tacit disuse by the people. (D. 1, 3, 32, 1.) The best evidence of custom was the judgments of Courts of Law. (D. 1, 3, 34.) It was held that no custom could be recognised if it were opposed to law or reason. (C. 1, 14, 2.)

The oldest fragments of Roman Law that have come down to us are ascribed to the period of the Kings. At Rome, a collection of such laws (*leges Regiae*), attributed to *Sextus Papirius*, was known under the name of *jus Papirianum*. (D. 1, 2, 2, 2.) Fragments of these laws have been collected from various authors by the diligence of modern inquirers, but we may take the XII Tables as the first solid ground in the history of Roman Law. The agencies by which that Law was developed, by which the scanty rules of the early age of the Republic grew into the *Corpus Juris Civilis* as it was left by Justinian, were three in number—the Jurisconsults, the Praetor and Legislation. Before considering these agencies in detail, a brief account of the XII Tables may be given.

THE LAWS OF THE XII TABLES.

About the year 450 B.C., a commission is said to have been appointed in Rome to visit Greece, and collect the information necessary to draw up a written body of laws. (D. 1, 2, 2, 4.) This suggestion of a foreign extraction for the oldest body of Roman Law, although it seemed in no way incredible to the great jurist Pomponius, can hardly be reconciled with the conclusions drawn by modern inquirers from a

wider knowledge of the history of ancient law. But although the XII Tables undoubtedly contain law of indigenous growth yet they do not give us the oldest law of Rome. Three centuries intervene between the reputed founding of the city and the XII Tables. During this period, perhaps even earlier, the fundamental institutions of Rome were already undergoing a process of decay. The autonomy of the family, and the absolute authority of its head, were, in the middle of the fourth century before Christ, already shaken. The XII Tables contain provisions enabling a wife or child to escape from that domestic thralldom upon which society in ancient Rome was based.

One of the most striking features of ancient society is the extreme tenacity with which it adheres to its usages. In some cases the immobility of ancient law may be ascribed to the religious sanction with which it is clothed. The laws are attributed to some divine being, from whose statutes and ordinances it were impiety to depart. But even when laws are attributed to a mere human legislator, there is still a profound dread of change. The attitude of primitive man towards the customs he has been taught to observe, is the counterpart of his timidity in the presence of nature. Man is timid where a being of less intelligence would be calm, because he perceives countless possibilities of suffering and calamity from the movement of the forces of nature, while yet his experience is too narrow to enable him to tell where evil will arise, and how it may be prevented. Thus, in a backward state of society, any change in the law is both feared and disliked. But in a progressive community, an expansion and growth of law are essential. How that is to be accomplished is the problem of vital interest. In the three agencies that have been enumerated, there may be remarked a progressive openness in effecting changes in the law. Thus, ostensibly, the juriconsults do not 'make,' they only 'interpret' law; and yet in numerous cases, by their process of interpretation, they extracted out of the XII Tables a good deal that was never in them. The Praetor, at least in later times, had an acknowledged right to supplement, to develop, and even to change the law, but his power was admitted within circumscribed, although somewhat indefinite, limits. Legislation, the direct and open change of law on account of its unfitness, is the latest in reaching maturity. Under the Empire, this came to supersede both the others.

THE JURISCONSULTS (*Jurisconsulti*, *Jurisperiti*, *Jurisprudentes*).

Until the time of Diocletian, the administration of law was not confided to professional lawyers. It was regarded as a public office that each citizen might be called upon to undertake. The Praetor was, generally speaking, more of a statesman than a jurist, a politician on his way to the consulship, not, as with us, a middle-aged lawyer retiring from active practice to exercise judicial functions. But there grew up in Rome a class of men who made it their business to know the law and to communicate their information to those who sought it. Hence a strange result. The men that knew the law had no direct participation in the administration of justice; the men that administered justice did not know law.

Pomponius, in his brief account of the history of Roman Law, informs us that the custody of the XII Tables, the exclusive knowledge of the forms of procedure (*legis actiones*), and the right of interpreting the law, belonged to the College of Pontiffs. (D. 1, 2, 2, 6.) He goes on to say that this continued for a century after the publication of the XII Tables, until Cneius Flavius, a clerk of Appius Claudius, who had written down the forms of actions, abstracted his master's book and published it. This publication was known as the *Jus Flavianum*. Some years later Sextus Aelius wrote a book in three parts (*jus tripartitum*). It gave an account of the XII Tables, of the interpretation of the XII Tables, and of the forms of procedure, (D. 1, 2, 2, 38), and was called *Jus Ælianum*. (D. 1, 2, 2, 7.) Tiberius Coruncanius, who lived about three centuries before Christ, is said to have been the first to publicly profess to give information on law. (D. 1, 2, 2, 35.) Until, however, about a century before Christ, the task of answering questions of law fell chiefly on aged patricians who had held high office; but from about that time the existence of a class of professional juriconsults may be dated.

During the Republic it was entirely voluntary for a magistrate to receive, or for any one to give, advice on law. Nevertheless the ignorance of the Praetor and *judices* naturally made them welcome the assistance it was in the power of the juriconsults to offer. But Augustus introduced two important changes; he gave a higher authority to the opinions of the juriconsults, but admitted only those to the exercise of the profession that had first obtained Imperial sanction. Hence-

forth the *jus respondendi* was confined to the privileged class of authorised jurists.

The answers of learned men (*responsa prudentium*) are the decisions and opinions of those that have been allowed to build up the laws. It was an institution of ancient times that there should be men to interpret the laws on behalf of the State. To them the Emperor gave the right to answer (*jus respondendi*), and they were called jurisconsults. [If all their opinions coincide, what they thus declare takes the place of statute; if they differ in opinion, the judge may lawfully follow which he pleases. This is pointed out by a rescript of the late Emperor Hadrian.] The decisions and opinions of all of them held such authority that, as has been settled, a judge could not lawfully depart from what they answered. (J. 1, 2, 8; G. 1, 7.)

The authority given to the opinions naturally extended to the writings of the jurisconsults. Hence an extraordinary impetus was given to the production of legal literature, and to the activity that followed during the first two centuries of the Christian era we owe the rich store of juridical reasoning that constitutes the permanent value of the mature Roman Law.

The system begun by Augustus had one drawback. Jurisconsults might give different opinions, and how was the person hearing a cause to determine which was right? So marked became the divisions among jurisconsults, that soon two rival schools grew up, giving opposite opinions on a considerable number of points of law. It was thus in the power of a Praetor or *judex* in many cases to determine his judgment, either for plaintiff or defendant, according as he chose to follow the Sabinians or the Proculians. Gaius refers to a partial remedy introduced by Hadrian. At a later period (A.D. 426) Valentinian enacted a law, commonly called "The Law of Citation," providing that the writings of only five jurists, Papinian, Paul, Gaius, Ulpian, and Modestinus, should be quoted as authorities. If a majority of these held one opinion, that was to bind the judge; if they were equally divided, the opinion of the illustrious Papinian was to be adopted. (C. Th. 1, 4, 1.)

From the manner in which the jurisconsults modified the law, it is extremely difficult to specify the changes that ought to be ascribed to them. It is probably to them, however, that we may ascribe the extension of *glans*, an acorn, to every kind of fruit; and *tignum*, or timber, to every kind of building material. Their influence was also felt in forms of conveying. Of these the most generally useful was the fictitious suit (*in jure cessio*), which although resorted to long before the exist-

ence of juriconsults as a professional class, was doubtless largely extended by them. It was by their ingenuity, as Cicero complains, that women were enabled to nominate their own *tutores* (p. 548). The great bulk of Roman Law, and all that is most valuable in it, is due to the juriconsults. A glance at the Table of Statutes and Constitutions shows how small relatively was the amount contributed by direct legislation.

THE PRAETOR.

The Praetor (p. 787) exercised a qualified or limited legislative power. With him all legal proceedings commenced. By him the questions at issue between the parties were put in shape. In a progressive community, where the wants of the people continually tend to go beyond the provisions of the law, it was almost inevitable that the Praetor should exercise on the growth of Roman Law an influence far more powerful, as it was more direct and authoritative, than the influence of the juriconsults. To avoid the evils of uncertainty, a practice grew up of issuing at the time of his taking office a Proclamation or Edict stating the rules by which he would guide himself in granting or refusing legal remedies. This Proclamation was called *Edictum Perpetuum*, in contrast to temporary or occasional Proclamations, which were known as *Edicta Repentina*. Naturally each successive Praetor was content in the main to follow in the footsteps of his predecessors, and the portion of their Edict that he transferred to his own was called *Edictum tralatitium* or *tralatitium*.

Until B.C. 66 there was no guarantee, except constitutional usage, that a Praetor would adhere during his term of office to the rules laid down in his own Proclamation; but in that year a statute (*lex Cornelia de Edictis Perpetuis*) was passed, declaring it illegal for a Praetor to depart from his Edict. The growth of this *Edictum Perpetuum* continued vigorously for more than a century after the Empire, although the triumph of the Imperial system involved the destruction of the great elective magistracies of the Republic. Under Hadrian, Salvius Julianus consolidated and arranged the Perpetual Edict; and that work may be taken to mark the end of Praetorian legal reform.

Edicts are the orders of those that have the right to issue Edicts (*jus Edicendi*). This right the magistrates of the Roman people have; but the largest right in regard to Edicts is that of the two Praetors, the city Praetor and the Praetor for aliens, whose jurisdiction in the provinces belongs to the Presidents; and again that of the Curule Aediles, whose jurisdiction

belongs to the quaestors in the provinces of the Roman people. Into the Emperor's provinces no quaestors at all are sent; and therefore in these provinces no such Edict is put forth. (G. 1, 6.)

As to the distinction between Provinces of the Roman People and Emperor's Provinces, see p. 802.

The Praetors' Edicts have no slight authority in law. These we usually call also the *Jus Honorarium*; because those that bear high honours, the magistrates that is, have given their authority to this branch of law. The Curule Ædiles, too, put forth an Edict in certain cases; and that Edict is a portion of the *Jus Honorarium*. (J. 1, 2, 7.)

The manner in which the Praetor affected the law was threefold; (1) he denied to a person having a perfect legal right his proper remedy; (2) he gave old actions to persons having no legal right; and (3) he introduced entirely new actions. Of the latter class, much the most important is the Interdict. Of the extension of old actions to new cases we have many examples. The extension is described as a fiction by Gaius, but the examples he gives shows that he uses the word Fiction in a somewhat peculiar sense. Thus while it was a rigid maxim of law that the Praetor could not make an Heir (*Heres*), he contrived, nevertheless, under the name of *bonorum possessio*, to give to a person all the rights and duties of the Heir. In the actions brought by such a person the *formula* ran in this way: "If—were Aulus Agerius heir—Numerius Negidius ought to pay him xxx *sestertii*: let the *judex* condemn Numerius to pay him that amount." This form, it may be observed, does not make the false averment that Aulus Agerius is heir; it simply says that the *judex* must give the same sentence against Numerius as if Aulus Agerius were heir. This seems rather a hypothetical than a fictitious action. An action of this kind was said to be founded on utility (*actio utilis*).

In some actions the Praetor took a bolder course. Although the so-called *fictio* is very transparent, yet we can believe that it was adopted from a desire to conciliate opposition. It was perhaps less of a shock to say that Aulus Agerius ought to recover as if he were heir, than to say that he ought to recover whether he was heir or not. It conveyed the impression that if Aulus were not heir according to strict law, nevertheless in justice he ought to be. But in some *formulae* a more direct course was taken. Thus in the case of a sale of inheritance the defendant was condemned to pay the buyer, if it appeared that he owed money to the deceased. (G. 4, 38.)

The Praetor stands in Roman Law midway between the

jurisconsults and the legislature. His right to alter the law was openly acknowledged, but it was not unlimited. The Praetor was hedged round by a firm, although invisible and somewhat elastic, band. He may be viewed as the keeper of the conscience of the Roman people, as the person who was to determine in what cases the strict law was to give way to natural justice (*naturalis aequitas*). (D. 44, 4, 4, 1.) But even a wider authority than this was ascribed to him, for he was allowed to entertain general considerations of utility (*publica utilitas*). (D. 1, 1, 7, 1.) A single example, however, may suffice to show that the Praetor's edict was confined within real, although indefinable, limits. The XII Tables gave the succession to a father to his children under his *potestas*; the children released from the *potestas* did not succeed. The Praetor, however, did not scruple to admit emancipated children to succeed their fathers; but it was reserved for later legislation to provide that a child should succeed to its mother.

The work of the Praetor may be summed up under three heads. It was the Praetor chiefly that admitted aliens within the pale of Roman Law. To him mainly is due the change by which the Formalism of Roman Law was superseded by well-conceived rules, giving effect to the real intentions of parties. Lastly, he took the first and most active share in transforming the law of intestate succession, by which, for the purpose of inheritance, the family was regarded as based on the natural tie of blood instead of the artificial relation of *potestas*.

LEGISLATION.

To give a full account of this topic would be to write the constitutional history of Rome; suffice it here to mark a few distinctions that are of importance in looking at the historical development of Roman Law.

During the Republic, the Popular Assembly was the fountain of legislation; during the earlier history of the Empire, the place of the Popular Assembly was gradually taken by the Senate, acting as the mouthpiece of the Emperor; finally, even this form was dropped, and all enactments flowed directly from the Emperor.

A statute (*lex*) is what the Roman people, when asked by a senatorial magistrate—a Consul for instance—[ordered and] settled. A decree of the commons (*plebiscitum*) is what the commons, when asked by a magistrate of the commons—a Tribune for instance—[ordered and] settled. The commons

(*plebs*) differ from the people (*populus*), as species does from kind (*genus*); for the name people means the whole of the citizens, counting the patricians and senators as well. But the name "commons" means the rest of the citizens without the patricians and senators. [Hence in old times the patricians said that they were not bound by the decrees of the commons, because they had been made without their authority.] But afterwards the *lex Hortensia* was passed, proving that the decrees of the commons should bind the whole people; and in that way they were made quite equal to statutes. (J. 1, 2, 4; G. 1, 3.)

During the Republic three Assemblies of the Roman people existed. The oldest was the *Comitia Curiata*, a patrician body, of which we have reminiscences in the law of adoption and of wills. The *Comitia Centuriata*, said to have been originated by one of the Kings, Servius Tullius, included the whole Roman people, Plebeians as well as Patricians, arranged in classes according to their wealth, but so as to give the preponderating power to the richest. The *Comitia Tributa* was based on a local division of the people, the vote being taken by wards. In this assembly the influence of numbers predominated. Livy mentions a *lex Valeria Horatia* (B.C. 449) as giving effect to a compromise between the Patricians and Plebeians, whereby it was agreed that the enactments of the *Comitia Tributa* should bind the whole people. Another law (*lex Publilia*, B.C. 339) seems to have provided that the ordinances of the plebeians should be law only with the concurrence of the Senate: the *lex Hortensia*, B.C. 287, gave full effect to the *plebiscita* without the Senate. Very often *plebiscita* (such as the *lex Aquilia*) are called *leges*, a term that in strict propriety ought to be confined to the enactments of the people (*Populiscita*).

A *Senatus Consultum* (decree of the Senate) is what the Senate orders and settles. [It takes the place of a statute, although this was formerly questioned.] After the Roman people grew so big that it was hard to bring them together on one spot in order to ratify a law, it seemed fair that the Senate should be consulted instead of the people. (J. 1, 2, 5; G. 1, 4.)

Theophilus traces the authority of the Senate to the *lex Hortensia*, which gave full validity to the *plebiscita*.

Imperial Constitutions.

An imperial constitution is what the Emperor settles by decree, edict, or letter. It has never been doubted that this takes the place of a statute, since the Emperor himself receives his power by statute. (G. 1, 5.)

Nay more: what the Emperor determines has the force of a statute (*quod principi placuit legis habet vigorem*), since by the *lex regia* that is passed to give him imperial power, the people has yielded up to him all its own power, both military and civil. Whatever, therefore, the Emperor settles by

a letter, or after inquiry decrees, or commands by an edict, is (it is agreed) a statute. These are what are called Constitutions. (J. 1, 2, 5.)

Plainly some of these are personal, and are not to be dragged into precedents, since this is not the Emperor's wish. For if he grants some one a favour because he deserves it, or inflicts a penalty on some one, or helps some one without a precedent, he does not go beyond the person. Others, again, since they are general, bind all beyond a doubt. (J. 1, 2, 6.)

The sovereign power was exercised by the Emperors in three ways; (1) by direct legislation, *edicta, constitutiones*; (2) by judgments in their capacity as the Supreme Tribunal (*decreta*); and (3) by *epistolae* or *rescripta*, giving advice on questions of law in answer to inferior judges. This authority seems to have been conferred by statute (*lex regia*) at the beginning of each reign. The law by which Vespasian was invested with supreme power was discovered in the 14th century; and it shows that the legal foundation of the Emperor's power was a statute.

The constitutions of the Emperors were collected at different times. The oldest collection is the *Codex Gregorianus et Hermogenianus*, which covers a period of about 200 years, from Hadrian to Constantine. Only a few fragments of it remain. From this period to the reign of Theodosius II. the constitutions are gathered in the *Codex Theodosianus*. It was made by a commission (consisting of sixteen members), appointed A.D. 435, which took three years to the work. It was sent by Theodosius to his son Valentinian III., who accepted it for the Western Empire, and presented it amid acclamation to the Senate. The Theodosian Code has little pretensions to scientific classification. The separate constitutions are collected under titles indicating their subject-matter: these titles are collected in sixteen books. It has come down to us almost complete.

The reign of Justinian marks the culminating period of Roman Law. The production of law had in a great measure ceased before his time, but by a very remarkable series of enactments, Justinian accomplished a marvellous work in cutting away anomalies and giving completeness and symmetry to the body of the law. The chief minister in these reforms was Tribonian, Quaestor of the Palace, who died A.D. 545. Justinian was scarcely seated on the throne when he began the work that has given him such renown. On 13th Feb. 528 a commission of ten members was appointed to draw up a Code like the Theodosian Code. In scarcely more than a year (7th April 529) the work was done. This Code, called the *Codex*

Vetus, was superseded by a later edition, and has been entirely lost.

On the 15th Dec. 530, a commission of sixteen members with Tribonian at its head was appointed for a new task—nothing less than to bring within a moderate compass and arrange in order the vast accumulation of law that had grown up under the hands of Jurisconsults and Praetors. The commission proceeded to deal with the works of 39 jurists, consisting of nearly 2000 books and 3,000,000 verses. In the course of only three years this pile of material was sifted and reduced to about one-twentieth of its original bulk. The scraps or fragments of the jurists were placed under titles, and these were collected in fifty divisions or books. The titles are arranged in the order of the topics of the *Edictum Perpetuum* as it was shaped by Salvius Julianus. The arrangement of the fragments under the titles seems to have been mechanical. The commission divided the writings of the jurists into three classes, and assigned each class to a separate sub-committee. The first class, called Sabinian, embraced all the systematic treatises on the *jus civile*; the second, called Edictal, consisted of the Praetor's Edict, with commentaries on it; the third, called Papinian, was formed of the writings of Papinian and the record of cases. Each sub-committee arranged its collections independently, and when they came together to arrange the titles, they took for the first group that which had the most numerous, and for the last that which had the least numerous fragments. Such at least is the conclusion that has been drawn with much ingenuity by a German jurist (Blume) from the distribution of the fragments. The finished work was called *Digesta* or *Pandecta*, and on the 30th Dec. A.D. 533 it obtained the force of law.

In the beginning of A.D. 533, a new commission was appointed of law-professors and advocates to prepare an elementary or preparatory text-book. The commission adopted the Institutes of Gaius as a groundwork, and the Institutes of Justinian are little more than a new edition of Gaius, with such omissions and additions as were necessitated by the lapse of more than three centuries. The Institutes of Gaius were recovered in 1816 by Niebuhr. Of Gaius himself almost nothing is known. Even his name is lost, Gaius being merely a praenomen. Notwithstanding the *lacunae* that still exist, his

work is invaluable in reference to the antiquities of Roman Law.

In the preparation of the Digest, many controverted points turned up, some of which were referred to Justinian for decision. The number of such questions that arose before the Digest was finished was fifty. They were at first collected separately, and called the *Quinquaginta Decisiones*.

After publishing the Pandects and Institutes in A.D. 529, a commission was appointed to revise the old Code, and incorporate the new constitutions and decisions. This revision was completed in the same year, and confirmed on the 16th Nov. 529.

Justinian found his zeal for law reform by no means stifled by these great works, and some of the most important enactments, especially relating to intestate succession, were published afterwards. These subsequent laws are called *Novellae*.

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— Pinaria	„ 471(?)
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— Genucia	„ 341
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— Pompeia (de Edictis)	„ 66
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→ Falcidia	„ 40
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— Publilia (de sponsu)	
— Remmia	

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— Furia Caninia	„ 8
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Senatus Consultum Silanianum	(46 or) 10

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Senatus Consultum Largianum	„ 42
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— Visellia.(?)	
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— — — — — Rubrianum	„ 101
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UNDER HADRIAN.

— — — — — Apronianum	
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— — — — — Vitrastianum	„ (?)

UNDER THE ANTONINES.

— — — — — Tertullianum	„ 158
— — — — — Orphitianum	„ 178
— — — — — Sabinianum	

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— — — — — Juncianum	
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LEGISLATION OF EMPERORS.

A TABLE OF THE CHIEF IMPERIAL ENACTMENTS REFERRED TO IN THIS WORK.

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Soldiers' wills, 590. | 617.

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 of, 393.
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JURISCONSULTS WHOSE WRITINGS ARE REFERRED TO IN THE *CORPUS JURIS.*

Prior to Augustus.

Sextus Aelius, about B.C. 200.	Quintus Mucius Scaevola, Consul B.C. 59 (the first systematic writer on law).
Cato, Father and Son, B.C. 140.	Caius Aquilius Galla, Praetor B.C. 66.
Publius Mucius Scaevola, B.C. 133.	Servius Sulpicius, Consul B.C. 51.
Manilius, Consul in B.C. 148.	Quintus Cornelius Maximus.
Brutus.	Labco Antistius, the Father.
Drusus, Consul in B.C. 147.	Granius Flaccus.
Publius Rutilius Rufus (a disciple of Panaetius the Stoic), B.C. 100.	Aelius Gallus.

Under Augustus, B.C. 29 to A.D. 14.

Aulus Ofilius.	Publicius Gellius.
Aulus Cascellius.	Antistius Labco (Son), Founder of the School of Proculians. A Stoic and Republican.
Trebatius, introduced <i>Codicilli</i> .	Ateius Capito, Founder of Sabinians. A supporter of Augustus.
Quintus Aelius Tubero, Consul B.C. 8.	Blaesus.
Alfenus Varus, Consul A.D. 1.	Vitellius.
Aufidius Nannus.	
Gaius Ateius Pacuvius.	
Cinna.	

The Schools of Sabinians and Proculians arose perhaps more from personal and political rivalry than from any broad contrast in their juridical views. The instances where they differed in opinion will be found enumerated in the Index.

SABINIANS.	PROCULIANS.
Ateius Capito.	Antistius Labco.
Masurius Sabinus.	Nerva (Father).
Caius Cassius Longinus.	Proculus.
Caelius Sabinus.	Nerva (Son).
Priscus Javolenus.	Pegasus.
Aburnus Valens.	Juventius Celsus (Father).
Tuscanus.	Juventius Celsus (Son).
Salvius Julianus.	Priscus Neratius.

Under Tiberius, A.D. 14-37.

Masurius Sabinus.	Proculus.	Catilius.
Nerva (Father).	Fulcinus.	Nerva (Son).
Caius Cassius Longinus.	Mela.	Atlicinus.

Caligula to Trajan, A.D. 37-117.

Coelius Sabinus.	Aristo.	Mincius Natalis.
Pegasus.	Neratius Priscus.	Urseus-ferox.
Juventius Celsus.	Arrianus.	Varius Lucullus.
Priscus Javolenus.	Plantius.	Fufidius.

lvi JURISCONSULTS REFERRED TO IN *CORPUS JURIS*.

Hadrian and Antoninus Pius, A.D. 117-160.

Celsus.	Volusius Maecianus.	Pactumeius Clemens.
Salvius Julianus.	Ulpus Marcellus.	Campanus.
Aburnus Valens.	Valerius Severus.	Octavenus.
Laelius.	Terentius Clemens.	Vivianus.
Vindius.	Publicius.	Sextus Pedius.
Africanus.		

Marcus and Commodus, A.D. 161-192.

GAIUS.	Mauricianus.	Saturninus.
Pomponius.	Papirius Justus.	Tarentenus Paternus.
Quintus C. Scaevola.	Papirius Fronto.	

Severus to Gordian, A.D. 193-237

Callistratus.	PAULUS.	Licinius Rufinus.
PAPINIANUS.	ULPIANUS.	Macer.
Arrius Menander.	Marcianus.	MODESTINUS.
Tertullianus.	Tryphoninus.	Florentinus.

Jurists whose date is uncertain.

Puteolanus.	Furius Antianus.
Paconius.	Rutilius Maximus.

E R R A T A.

- PAGE 5, line 13 after "where" add "men commonly pass."
- 13, ,, 10 from bottom, for "master's" read "masters'."
 - 25, ,, 16 for "recission" read "rescission."
 - 29, ,, 16 from bottom, for "Vestibulici" read "*Vestibulici*."
 - 34, ,, 3 ,, ,, (J. 1, 61, 2) read (J. 1, 6, 2).
 - 55, ,, 2 ,, ,, "legitumtion" read "legitimation."
 - 58, ,, 14 and 19, from top, for "G. 2, 136" and "G. 2, 137," read (G. 1, 136),
(G. 1, 137).
 - 71, ,, 3 from top, for (G. 1, 229) read (G. 1, 129).
 - 80, ,, 14 ,, ,, (G. 1, 11, 1) ,, (G. 1, 111).
 - 103, ,, 18 from bottom, ,, (J. 4, 9, 4) read (J. 4, 9, 1).
 - 121, ,, 5 ,, ,, "depositor" read "depositee."
 - 150, ,, 21 from top, ,, "Servus" read "Servius."
 - 165, ,, 9 from bottom, ,, (J. 2, 14) ,, (J. 2, 1, 4).
 - 200, ,, 6 ,, ,, (p. 105) read (p. 97).
 - 203, ,, 19 ,, ,, "OWNERSHIP" read "INHERITANCE."
 - 269, ,, 17 ,, ,, "Gallus" read "Julius."
 - 346, ,, 17 ,, ,, "required" ,, "acquired."
 - 386, ,, 12 ,, ,, "3" ,, "V."
 - 392, ,, 21 ,, ,, "sestertia" ,, "sestertii."
 - 397, ,, 25 ,, ,, "debtor" ,, "creditor" twice.
 - 427, ,, 4 ,, ,, "sixth" ,, "second."
 - 438, ,, 16 from top, ,, "creditors" read "debtors."
 - 542, ,, 5 ,, ,, "signities" ,, "segnities."
 - 681, ,, 16 from bottom ,, (J. 37, pr.) read (J. 3, 7, pr.)
 - 711, ,, 12 ,, ,, (G. 2, 24, 1) ,, (J. 2, 24, 1).
 - 712, ,, 5 ,, ,, (G. 2, 79) ,, (G. 2, 279).

EXPLANATION OF ABBREVIATIONS.

J. is Institutes of Justinian. (J. 3, 1, 1.) The first figure indicates the book, the second the title, and the third the section referred to. Thus, J. 3, 1, 1 means 3d book, 1st title, 1st section.

G. is Institutes of Gaius. (G. 2, 6) means 2d book and 6th section. Gaius is not arranged in titles.

D. is Digest or Pandects. (D. 39, 3, 1, 17) means the 39th book, 3d title, 1st fragment, and 17th section of that fragment.

C. is Code of Justinian. (C. 4, 8, 1) means 4th book, 8th title, and 1st constitution. (C. 6, 30, 18 pr.) means 6th book, 30th title, 18th constitution, and the *principium* or preliminary section.

Nov. is the Novels of Justinian. They are numbered separately, the longer ones being divided into sections. (Nov. 81, 3) is the 81st novel and 3d section.

C. Th. is the Code of Theodosius, which is divided in the same way as the Code of Justinian.

Paul, Sent. 2, 7, 2 is the 2d book, 7th title, and 2d section of the *Sententiae* of Julius Paulus.

Ulp. Frag. 25, 2 is the 25th title and 2d section of the Fragments of Domitius Ulpianus.

Ulp. Inst. is the fragments of Ulpian's Institutes.

Mos. et Rom. Legum Collat. 6, 4, 2 is the 6th title, 4th chapter, and 2d section of the *Mosaicarum et Romanarum Legum Collatio*.

Frag. Vat. is the Vatican Fragments.

Vet. ejusd. jur. consult. is *Veteris ejusdam jurisconsulti consultatio*, a short collection of moot points in law.

The above, beginning with Paul, Sent., are to be found in HUSCHKE's

"Jurisprudentiae AntJustinianae quae supersunt."

N.B.—It is important for the student to bear in mind that the Institutes of Gaius are more than 300 years older than the Institutes of Justinian.

Passages in the translation enclosed in square brackets are to be found in Gaius only, and not in Justinian.

BOOK I.

RIGHTS *IN REM.*

BOOK I.

R I G H T S I N R E M.

First Division.

RIGHTS *IN REM* IN RESPECT OF ONE'S OWN PERSON.

DEFINITION.

TO prevent men hurting one another is naturally a paramount object in every system of law. It is vain to protect property, if life and limb are not secure. But no system of law attempts to provide a remedy for every hurt that may be done to body or mind. The harm may be trifling, and therefore undeserving of attention; or it may be grievous, but beyond reach of the instruments that a lawgiver has at his disposal. A line must be drawn. The law specifies the instances where it requires all men to abstain from doing harm or giving pain to one another. In other words, every man has a right, within the limits fixed by law, to personal immunity. In the technical language of jurisprudence, such a right is described as a right *in rem* in respect of one's person. The unlawful causing of pain or hurt is a violation of such a right.

But pain or hurt may be caused in two ways; either INTENTIONALLY or through NEGLIGENCE. If pain or hurt were caused *intentionally*, the wrong done was technically called an *injuria*. The term *injuria* may be defined with almost perfect exactness as a wilful violation of a right *in rem* that one has in respect of one's own person. It may be suspected that at first the Roman Law provided no remedy when harm was done to a freeman through negligence; but the deficiency, if it ever existed, was ultimately supplied. (D. 9, 1, 3; D. 9, 2, 13; D. 17, 2, 52, 16.)

Illustration.

A freeborn boy was sent to a shoemaker to learn his trade. The shoemaker, in a moment of irritation caused by the dulness of his pupil, threw a shoe at him, and destroyed his eye. Both Julian and Ulpian agree that the shoemaker did not commit an *injuria*, because his intention was simply to correct his pupil, and he did not throw the shoe for the purpose of hurting his eye. Nevertheless, they held that he was liable to pay compensation for the mischief he had done (D. 9, 2, 5, 3), on the ground that he did not, in correcting his pupil, take proper care to avoid excessive hurt. Undue severity of correction is tantamount to negligence. (D. 9, 2, 6.)

The conception of NEGLIGENCE, as a ground of responsibility, will be discussed more conveniently in relation to the violation of rights to property, and, at this stage, attention may be confined to intentional violations of rights *in rem*; in other words, to the characteristics and limits of the delict of *injuria*.

The subject may be considered under two heads,—First, an enumeration of the several rights constituting the class of rights *in rem* in respect of one's person; and, second, the circumstances that made the infliction of pain or harm an *injuria*, or violation of these rights.

First, ENUMERATION OF RIGHTS *in rem* TO ONE'S OWN PERSON.

I. HARM TO THE BODY.—It is an *injuria* to strike a man with your fist for instance, or with a whip, much more to scourge him. (J. 4, 4, 1; G. 3, 220.)

The protection of the body was naturally an object of solicitude in the earliest period. The XII Tables contain provisions on this subject, the terms of which have been preserved to us.¹ All wilful hurt to the body was included under *injuria*; and also a threat, if accompanied with an apparent intention of immediately executing it. (D. 47, 10, 15, 1.)

An injury inflicted on the mind by drugs, being primarily an injury to the brain, may be included under the head of wrongs to the body. Examples are love-philtres or potions. (D. 47, 10, 15.)

2. PERSONAL FREEDOM.—To imprison a man, or forcibly keep him as a slave, knowing him to be free, was an offence dealt with by a statute (Lex Fabia or Favia) in existence before Cicero. (Pro Rabirio, 3; D. 48, 15, 6, 2.) That statute imposed only a pecuniary penalty, and it fell into disuse when kidnapping freemen was made a crime. (D. 48, 15, 7; C. 9, 20, 7; C. 9, 20, 16.)

¹ *Manu fustive si os fregit libero, CCC, [si] servo OL poenam subito.*
Si membrum rupsit, ni cum eo pacit, talio esto.

3. INSULTS.—It is an *injuria* to revile a man in public (*convicium facere*). (J. 4, 4, 1; G. 3, 220.)

Convicium was the offence of publicly insulting or mobbing a man (D. 47, 10, 15, 11), or assembling before his house or shop to annoy him. (D. 47, 10, 15, 7.) This offence was created by the Prætor.¹

In some cases insults to the dead become an *injuria* to the living, not exactly for the reason assigned by Lord Coke in a celebrated case (Wraynam's) that justice lives although the person be dead, but because in popular estimation a man's personal dignity might be wounded by insults offered to his predecessors.

Illustrations.

An heir was supposed to be bound to uphold the good name of the person whom he succeeded, and an insult offered to the corpse of the deceased was looked upon as an insult to him. (D. 47, 10, 1, 4.)

When the statue of a man's father, placed on a bust, is struck with stones, an *injuria* is done to the man himself. (D. 47, 10, 27.) If the statue were joined to a tomb, so as to become an immoveable, the offence was regarded rather as sacrilege, and the remedy of the son was the action for a violated tomb (*actio sepulcri violati*).

4. SLANDER, LIBEL.—It is the duty of every one to abstain from diminishing the reputation or good name of another.² The Prætor says, "Let nothing be done to defame any man. If any one does anything against the foregoing, I will take up each case on its merits, and visit it accordingly." This statement, although it indicates exactly the object of the law, is too wide, and must be qualified by the illustrations here subjoined. A man's reputation may be assailed by acts, or by words written or spoken. The Roman law provides for all these ways.

Illustrations.

1°. By words.

(1.) To insult a freeman by calling him a slave is an *injuria*. (C. 9, 35, 9.) So likewise to call one's grandmother a slave falsely. (C. 9, 35, 10.)

(2.) To call a man an informer falsely, is an *injuria*. (C. 9, 35, 3.)

2°. By writing.

And it is an *injuria* to defame a man in prose or in verse whether you write the libel, draw it up, or publish it, or wilfully instigate or abet those that do. (J. 4, 4, 1; G. 3, 220.)

¹ *Qui adversus bonos mores convicium cui fecisse, cujusve opera factum esse dicitur quo adversus bonos mores convicium fieret: in eum judicium dabo.* (D. 47, 10, 15, 2.)

² *Ait Prætor: "Ne quid infamandi causa fiat; si quis adversus ea fecerit, prout quæque res erit, animadvertam."* (D. 47, 10, 15, 25.)

The words of Justinian are taken from the Lex Cornelia (B. C. 81), which proceeds thus:¹ "Even if he published it in the name of another, or anonymously, an action on the subject shall be allowed; and if he that did such a thing is condemned, it is ordained that he shall be by statute incapable of taking any part in the making of a will."

Carmen is the word employed in the XII Tables, which sanctioned the punishment of beating. That punishment was taken away by the Lex Portia. *Carmen*, says Paul (Paul, Sent. 5, 4, 15), includes not only inscriptions (*epigrammata*) and satirical poetry (*satiræ*), but every form of writing. *Psalterium* was a libel composed to be sung in public. (Paul, Sent. 5, 4, 16.) Insults conveyed in pictures were also libels.

It must be borne in mind that there was no *injuria* without an intention to destroy another's good name. Hence, in litigation, each party might lawfully make injurious statements of the other; but even in this case moderation must be observed. (Paul, Sent. 5, 4, 15.) The mere circumstance, however, of a libel being contained in a document sent to the Emperor, did not protect it from punishment. (D. 47, 10, 15, 29.)

3°. By acts.

(1.) And it is an *injuria* to take possession of a man's goods as if for debt [and to put them up for sale] when you know he owes you nothing. (J. 4, 4, 1; G. 3, 220.)

(2.) Akin to this is the offence of demanding as a debt what is not due, in order to injure another's credit. (D. 47, 10, 15, 33.)

(3.) It was usual to sue a debtor before proceeding against his sureties, and whoever, therefore, passed over a solvent debtor as if he were insolvent, and proceeded against the sureties to damage his credit, committed an *injuria*. (D. 47, 10, 19.)

(4.) A creditor is bound to accept a solvent surety; and if he refuses one who is able to answer for the debt, with the object of defaming him, he commits an *injuria*. (D. 2, 8, 5, 1.)

(5.) To apprehend a person as a fugitive slave, or to bring an action to claim a person as a slave, knowing him to be free, is an *injuria*. (D. 47, 10, 12; D. 47, 10, 22.)

(6.) He that flees for refuge to the statues or images of the emperors, to make it appear falsely that another has unlawfully imprisoned him, commits an *injuria*. (D. 48, 16, 28, 7.)

5. To enter a man's house against his will, even to serve a summons (D. 47, 10, 23), was regarded as an invasion of his privacy, and almost as a personal insult. (D. 47, 10, 44.)

¹ *Etiam si alterius nomine ediderit, vel sine nomine, uti de ea re agere liceret, et, si condemnatus sit qui id fecit, intestabilis ex lege esse jubetur.* (D. 47, 10, 5, 9.)

"*Intestabilis*" here means that the convicted person could neither make, nor be witness to, a will. (D. 28, 1, 18, 1.)

The *lex Cornelia* (B. C. 81), too, speaks of *injuriae*, and has brought in a special *actio injuriarum*. This action lies when a man alleges that he has been beaten or scourged, or that his house has been entered by force. And by "house" in this case is understood his own house in which he dwells, or a hired house, or one in which he lives rent-free or as a guest. (J. 4, 4, 8.)

In one sense this offence can hardly be considered as directed against the person of the occupier, but it was against his dignity; for the majesty of a Roman citizen was supposed to extend beyond his strict personality to his immediate belongings, and even to his clothes. (D. 47, 10, 9, pr.) *Directarii*, who sneak into a house to steal, were guilty of a criminal offence. (Paul, Sent. 5, 4, 8.)

6. Attempts directed against the chastity of boys and women constitute *injuriae*.

And it is an *injuria*, to keep following about a respectable woman, or a youth still wearing the *praetexta*, or a young girl, or to attempt any one's chastity. And clearly there are many other forms of *injuria*. (J. 4, 4, 1; G. 3, 220.)

This offence consisted in persistently following them about, as such constant pursuit was in itself a reflection on their character. (D. 47, 10, 15, 22.)

The *praetexta* was worn till the age of puberty.

The use of obscene language is an *injuria*, although not successfully accomplishing the immoral intention. (D. 47, 10, 15, 21.)

To accost (*appellare*) and address a respectable woman in the dress of a matron was an *injuria* if the object were to conquer her chastity. But a respectable woman, if dressed as a slave or as a prostitute, had no remedy if she were so accosted. (D. 47, 10, 15, 15.)

7. It is the duty of every one to abstain from vexatiously setting in motion against another the machinery of the law. (D. 47, 10, 13, 3.)

8. Another case is this:—If at a spot where anything is kept so placed or hung that it might, if it fell, do harm to some one. For this there is a fixed penalty of ten *aurei*. (J. 4, 5, 1.)

In this case the penalty is exacted although no one is hurt. (D. 9, 3, 5, 11.)

This injury is called a quasi delict (*quasi ex maleficio*). This means nothing, however, except that it is a late addition to the roll of delicts, made not by any statute, but by the judicial authority of the Praetor.

Second, WHAT CIRCUMSTANCES MADE THE INFLICTION OF PAIN OR HURT AN *injuria*?

In its general sense, *injuria* means an unlawful act (*quod non jure fit*). In a special sense, it is used to mean sometimes an affront (*contumelia*, from

contemno, in Greek ὑβρίς; sometimes a wrong (*culpa*, in Greek ἀδίκημα)—and this is the sense of *damnum injuria* in the *lex Aquilia*; and sometimes unfairness or injustice (in Greek ἀδικία), for when a decision is wrongfully given (*non jure*) against a man by the Praetor or *judex*, that man is said to suffer an *injuria*. (J. 4, 4, pr.)

Of the four meanings here given to *injuria*, only one is applicable to the present case. Generally, it may be said that an injury is the intentional and illegal infliction of pain or hurt. To constitute a violation of a freeman's rights to his own person, three elements chiefly must concur. •

1. The violation must be intentional; mere negligence does not give rise to *injuria*. It is not, however, necessary that the wrong-doer should know whom he hurts, provided he has a general intention to hurt some one. (D. 47, 10, 3, 2.)

Illustrations.

A strikes B in joke or in a sparring-match. As A has no intention to injure B, A does not commit any *injuria*. (D. 47, 10, 3, 3.)

An astrologer or soothsayer, a sincere believer in his art, says a man is a thief who is not: he has uttered a slander, but he has not committed any *injuria*, for he is himself in error. (D. 47, 10, 15, 13.)

A strikes B, believing him to be his slave, and therefore considering himself as exercising his just right. A does not commit any *injuria*, although it should turn out that in reality B is free. (D. 47, 10, 3, 4.)

A man intending to hit his slave, misses his aim, and accidentally hits a freeman standing by; there is no *injuria*. (D. 47, 10, 4.)

2. The act must be illegal. Every infliction of pain is not an injury, but only such as the law forbids. Pains inflicted by the law itself were not an infraction of the rights of personality. (D. 47, 10, 13, 1.) Hence a magistrate could not be compelled to give compensation for such losses as he caused in the course of administering justice, provided he did not intentionally abuse his authority. (D. 47, 10, 33.) Teachers also, and others set over the young, were permitted to chastise those committed to their care, provided they did not employ undue severity. (D. 9, 2, 6.) The powers of masters over slaves, fathers over children, husbands over wives, in this respect, will be examined more fully hereafter.

But the most usual case in which violence was permitted was in self-defence. An attack upon me releases me from the duty of respecting the person that assaults me. It is a general principle of law to permit men to repel force by force, or to use force in defence of a right. (D. 1, 1, 3; D. 9, 2, 4; D. 4, 2, 12, 1.) Within what limits, on what occasions, is it lawful in self-defence

to hurt, or even kill another? The first broad distinction is between a wrong already completed, and one in process of consummation or immediately impending. When the wrong is consummated, when the mischief is done, it is never lawful to resort to force; the peaceful remedy of an action or criminal accusation can alone be employed. But if the invasion of my right or the attack on my person is not completed, as a general rule force may be used in defence. (D. 43, 16, 3, 7; D. 43, 16, 3, 9.)

Illustration.

A shopkeeper placed a lamp in a lane by night, and a passer-by stole it; the shopkeeper pursued and caught the thief. The thief thereupon began to strike the shopkeeper, to make him let go, and the shopkeeper in the fight scratched out his eye. The shopkeeper was in this instance justified, but he would not, if the thief had not begun the fight, nor if he had scratched out the thief's eye merely from irritation at the theft. (D. 9, 2, 52, 1.)

A second point is whether force could be used in defence of property as well as of personal safety. As regards personal safety, any amount of force was justifiable, if it was reasonably necessary. A man put in fear of his life, could with impunity kill his assailant; but if he could have caught the man, and there was no necessity for killing him, he was not justified. (D. 9, 2, 5, pr.; C. 9, 16, 2; C. 9, 16, 3.) In defence of property less latitude was given.

To kill wrongfully (*injuria*) is to kill when you have no right to. Therefore he that kills a robber does not come under the *lex Aquilia*, especially if there was no other way in which he could escape the danger. (J. 4, 3, 2.)

According to the law of the XII Tables, it was lawful to kill the nocturnal thief, but not a thief during the day, unless he was provided with deadly weapons. The Aquilian law is understood to have imposed a restriction on this somewhat dangerous power, by admitting the justification only when the sufferer had called lustily for help. (D. 9, 2, 4, 1.) In later times, the latitude given by the XII Tables seems to have been taken away. Ulpian says (D. 48, 8, 9) that even in the case of the nocturnal thief, killing him is to be justified only if the owner of the property could not have spared his life without peril to himself. Thus, in effect, the extreme step of killing an intending thief was allowed only when the life of the person assailed was in peril, as well as his property. Any minor degree of force was, however, justifiable, if necessary for the defence of one's property.

3. The injury must be inflicted without the consent of the person that suffers the injury.¹ But when one wrong affects two persons, one of whom alone consents, such consent does not take away the remedy of the other.

Thus a slave may willingly be led to risk his money at games of chance, but his master may still suffer an injury, and have an action against the person who through the slave has injured him. (D. 47, 10, 26.)

Perhaps the same idea led to the rule, that if a person suffering an injury showed at the time no indignation, he was considered to forgive the wrongdoer, and to forego all rights to damages or penalties for the wrong.

The right to sue is lost if you pretend not to be hurt. And therefore if you overlooked an *injuria*—that is, at the moment you suffered it gave it no further heed—you cannot afterwards change your mind, and revive the *injuria* you have once let rest. (J. 4, 4, 12.)

INVESTITIVE FACTS.

From the nature of the case, rights *in rem* to one's person are not created by any special investitive facts, nor can they be extinguished by any divestitive facts. The duties corresponding to the rights are nearly universal; they are duties owing by all men to all men. The rights are indelible, and they belong to one simply as a member of civil society.

Broadly, but not quite accurately, it may be said that rights *in rem* belong to every man against every man. The exceptions fall into three classes—(1) Persons that are exempt from these duties; (2) Persons that have not rights *in rem*; and (3) Substituted or vicarious responsibility.

I. Persons against whom rights *in rem* are not available.

The only persons that were not punishable for their wrongful acts were those presumed to be incapable of having a wrongful intention. Inasmuch as intention is of the essence of *injuria*, it follows that those who are destitute of understanding, and are unable to comprehend the consequences of their acts, should be exempt from the penalties of the offence. Hence madmen (*furiosi*) and children under seven years of age (*pubertati proximi*) were considered incapable of committing an *injuria*. (D. 50, 17, 111 pr.; D. 47, 10, 3, 1.)

II. Persons that have not rights *in rem* in respect of their own personality.

¹ *Nulla injuria est quae in volentem fiat.* (D. 47, 10, 1, 5.)

Slaves, persons subject to *manus, patria potestas, mancipium*, were either incapable of suffering an *injuria*, or at all events could not, as a rule, sue the wrongdoer. It will presently be seen to what extent such persons were protected by law from hurt.

III. Persons that are liable for wrongs done by others,—vicarious responsibility.

1. If you have a lodging, whether your own, or hired, or occupied rent free, and from that lodging anything is thrown down or poured out so as to harm some one, then you incur an *obligatio quasi ex maleficio*;—*quasi ex maleficio*, and not *ex maleficio*, for often the fault is another's, either a slave's or a child's. (J. 4, 5, 1.)

If a *filiusfamilias* lives apart from his father, and if from his lodging anything is thrown down or poured out, or if he has anything so set or hung that its fall would be dangerous, in this case Julian was of opinion that against the father there is no action, but only against the *filiusfamilias* himself—just as in the case of a *filiusfamilias* that when judge has given an unlawful judgment (*qui litem suam fecerit*). (J. 4, 5, 2.)

In like manner, when a slave inhabited a house separate from his master, and anything was thrown down or poured out, to the damage of passers-by, but not by him, the master was not responsible. The slave, if he were blameworthy, might, however be punished. (D. 9, 3, 1, 8.)

2. Not only the doer of the wrong (*injuria*) is liable to an *actio injuriarum*, but he too whose malicious deeds or schemes have led to its being done; not only he that strikes a man on the face with his fist, but he that caused him to be so struck. (J. 4, 4, 11.)

The principal is responsible for the wrongs done by the agent whom he has engaged (*mandatum*) or hired (*conductio*) for the purpose. (D. 47, 10, 11, 3; D. 47, 10, 11, 4.) So a person that has induced another to do a wrong, which, but for such persuasion, he would not have done, is responsible. (D. 47, 10, 11, 6.) But the person acting in consequence of such persuasion or bargain is also responsible. (C. 9, 21, 5.)

3. The responsibility of masters for slaves, fathers for children, &c., will be discussed under these respective heads, Slavery, *Potestas*, &c.

REMEDIES.

A. Negligence.—The remedy is the *Actio Legis Aquiliae*, of which an account will be given under the topic of Ownership.

B. Intentional Harm.—*Actio Injuriarum*.

1. The measure of compensation in simple injury (i.e., *non atrox*).

(1.) According to the law of the XII Tables.

The penalty for *injuria* was fixed by the XII Tables as follows :—For a limb disabled, to suffer the same in turn ; for a bone broken or crushed, in the case of a freeman, 300 asses, in the case of a slave, 150 asses ; in all other cases, 25 asses. And in the great poverty of those times these money penalties seemed perfectly adequate. (G. 3, 223, and more shortly J. 4, 4, 7.)

(2.) Modification of the penalty by the Praetors.

But the rule of law now in use is different, for the Praetor allows the sufferer to claim a specific sum ; and the judge condemns the wrongdoer to pay any sum not exceeding this, to be fixed at his discretion. (G. 3, 224.)

The penalty for *injuria* introduced by the XII Tables has fallen into disuse. That introduced by the Praetors, and therefore called *honoraria*, is in daily use in the courts. For according to a man's rank and respectability the estimate of the harm done by an *injuria* rises or falls. And the same gradation is observed, and properly, even in the case of slaves ; for there is one estimate in the case of a slave that is manager, another in the case of a slave in a position of some trust, and a third in the case of an utterly worthless slave,—one, for instance, that works in chains. (J. 4, 4, 7.)

When anything has been thrown down or poured out from a lodging, the amount for which the *actio injuriarum* may be brought is fixed at twice the damage done. For killing a freeman the penalty is fixed at 50 aurei. But if he lives, and it is alleged that he has suffered harm, an action may be brought for a fair sum to be fixed at the discretion of the judge. And the judge ought to reckon the doctor's fees and the other outlay required for the cure, as well as the wages of labour that the sufferer has lost or will lose through being disabled. (J. 4, 5, 1.)

2. Compensation for aggravated injury (*atrox injuria*).

(1.) When is an injury aggravated ?

An *injuria* is held to be aggravated by considerations—(1) Of the nature of the act, as when a man is wounded, or scourged, or beaten with sticks ; or (2) Of the place, as when he is injured in the theatre or in the forum or in sight of the praetor ; or (3) Of the person, as when it is a magistrate that suffers the *injuria*, or when senators are injured by a person of low degree, or a parent by his children, or a patron by his freedmen. For an injury to a senator, a parent, or a patron, is held to differ widely from an injury done to a stranger or to a person of low degree. (4.) Sometimes too the position of a wound aggravates an *injuria*, when for instance a man is struck in the eye. And then it matters little whether it is a *paterfamilias* or a *filiusfamilias* that is injured, for in both cases alike the injury is held to be aggravated. (J. 4, 4, 9 ; G. 3, 225.)

(2.) Compensation.

An aggravated *injuria* is usually assessed by the Praetor. And when once he has fixed the amount in which the defendant is to give security to appear,

the plaintiff rates the damage at the same sum in his *formula*; and the judge, although he can award a less sum, yet often out of deference to the Praetor does not venture on a reduction. (G. 3, 224.)

3. A person condemned for *injuria* suffered infamy, as also the person at whose instigation it was done. (Paul, Sent. 5, 4, 20.)

4. In cases where the *lex Cornelia* applied, involving an injury to reputation, the defendant was allowed to take an oath and clear the plaintiff's character, thereby escaping punishment.

5. The *actio injuriarum*, being penal, could not be brought against the heirs of the wrongdoer; and also, herein differing from other penal actions, it could not be brought by the heirs of the sufferer. (D. 47, 10, 13.)

6. Prescription.

When the remedy was given by the edict of the Praetor, no action could be brought after one year. But when it was given by the *lex Cornelia*, it could be brought at any time; until at a subsequent period, like all personal actions, it was limited to 30 years.

7. Concurrence of criminal jurisdiction.

Lastly, it must be observed that for *injuria* the sufferer may elect to bring either a criminal prosecution or a civil action. If he elects to bring a civil action, the damages are assessed as has been said, and they form the penalty imposed. But if a criminal prosecution, it is the duty of the judge to inflict on the accused a penalty *extra ordinem*. Note, however, that a constitution by Zeno brought in the rule that *viri illustres*, and those above them, may either bring or defend an *actio injuriarum* through their procurators. (C. 9, 35, 11.) Such is its tenor, as may be seen more clearly by referring to it. (J. 4, 4, 10.)

Offences against decency and chastity were punished with relegation, deportation, or even (for rape) with death. (D. 47, 11, 1 pr.; Paul, Sent. 5, 4, 4.) Libels also were punished with relegation or deportation. (Paul, Sent. 5, 4, 15, 17.)

Viri illustres.—The officials under the Empire formed a hierarchy, arranged in different ranks, the highest of which was the *viri illustres*. This class embraced the Praetorian Prefects, the Urban Prefects, the Masters of the Horse (*magistri equitum*), and certain others of the highest officials in the imperial household.

Second Division.

RIGHTS *IN REM* TO OTHER HUMAN BEINGS.

I.—S L A V E R Y.

DEFINITION.

I.—RELATION OF SLAVE TO HIS MASTER.

Slavery is an institution of the *Jus Gentium*, by which, contrary to nature, a man becomes the property of a master. (J. 1, 3, 2.)

Freedom, in virtue of which men are called free, is the natural right (*facultas*) each man has of doing what he pleases, except in so far as he is hindered by force or law. (J. 1, 3, 1.)

According to this definition, a master is the *owner* of his slave. But an examination of the law shows that although the nearest legal relation to that between master and slave is ownership, yet in several important respects the position of a slave was not quite so bad. This will appear from a consideration of the elements of property, as commonly described,—the right of exclusive use; the right of destroying; and the right of alienating.

1. Every master had a right to the use of his slave, to all the services he was capable of rendering, and to everything that the slave, if free, would have acquired for himself. (G. 1, 52.) Conversely, the slave himself had no right of property. It will be seen afterwards how far, under the name of *peculium*, a sort of customary ownership was allowed to slaves, and to what extent it was recognised by law.

2. The right of destroying.

Slaves, therefore, are in the power of their masters; and this by the *Jus Gentium*. For among all peoples alike, as may be observed, masters have over slaves the power of life and death, and all a slave's gains are the master's gains. (J. 1, 8, 1; G. 1, 52.)

Until the Empire, no legal check seems to have been placed on this terrible power. During the whole period of the Republic, the only security of the slave was the conscience of his master and the influence of general opinion. The history of the Empire from Claudius to Constantine is marked by successive efforts to throw around the slave the shield of law. According to Suetonius (*Life of Claudius*, c. 25), the Emperor Claudius was the first to declare the killing of a slave by his master to be murder. This was indisputably the law under Antoninus Pius. Claudius is also alleged to have given another lesson of humanity, by ordering a slave to become free who had been exposed without assistance in illness, but had recovered. The *lex Petronia* (A.D. 61) took away from masters the power of compelling their slaves to fight with wild beasts, and enacted that this species of cruelty should be adopted only as a public punishment for the misconduct of the slave. (D. 48, 8, 11, 2; D. 18, 1, 42.) The sale of a slave for such a purpose subjected both buyer and seller to punishment. (D. 48, 8, 11, 1.) Hadrian (Spartianus in Hadrian, c. 18) abolished the private prisons (*ergastula*) in which masters were accustomed to immure their slaves. He banished a woman for five years who had been guilty of great cruelty towards her female slaves. (Mos. et Rom. Legum Collat. 3, 3, 4.) He also made castration of a slave, as well as of a freeman, a capital crime, even when the act was done with the consent of the slave. The age of Antoninus Pius is also marked by a distinct advance in humanity.

But now no subject of ours is allowed to treat his slaves with a cruelty that is legally groundless and excessive; for by a constitution of the late Emperor Pius Antoninus, he that without cause kills his own slave, is to be punished equally with him that kills the slave of another. And even too great severity on the part of masters is checked by a constitution of the same Emperor. For, when consulted by certain provincial governors in regard to slaves that flee for refuge to some sacred building, or to the Emperors' statues, he gave command that, if the master's cruelty seemed beyond endurance, they should be forced to sell the slaves on favourable terms, and have the purchase-money given them:—a righteous decision; for it is for the public good that no man abuse his property. [For we ought not to abuse our rights; and on this very principle spendthrifts are interdicted from managing their own possessions.] And the words of that rescript sent out to Ælius Marcianus are these:—"The masters' power over their own slaves ought to remain unimpaired; nor ought any man to lose his lawful rights. But it is the masters' interest that relief be not denied to the victims of cruelty or starvation, or of unbearable ill-usage (*injuria*): for they implore it on good

grounds. Therefore look into the complaints of the slaves of Julius Sabinus' household that have fled for refuge to the Emperors' statues ; and if you find that they have been too harshly treated, or subjected to shameful ill-usage, order them to be sold, with this reservation, that they are not again to fall under the power of their present master. And let Salvinus know that, if he evades this constitution of mine, his misconduct shall be severely visited." (J. 1, 8, 2 ; G. 1, 53.)

Another rescript of the same Emperor deserves notice : it is addressed to one Alfius Julius (Mos. et Rom. Legum Collat. 3, 3, 5-6), and is related by Ulpian. It provides that, if a master treat his slave with great severity, or exact oppressive services, or neglect to give him a sufficiency of food, he shall be compelled to sell the slave. Finally, Constantine attempted to mark off the narrow line that separated homicide from death through flogging. The rule is clearly stated by Paul (Mos. et Rom. Legum Collat. 33, 2, 1). If the slave dies from a flogging, the master is not guilty of homicide, unless he intended to kill the slave. The use of a deadly weapon was conclusive evidence of such intention. (C. 9, 41, 1 ; C. Th. 9, 12, 2.)

3. The right of alienating the slave. A slave could be sold, pledged, bequeathed, or dealt with exactly like any other property. It is interesting, however, to observe that regard was had, in selling lots of slaves, to the claims of relationship. Seneca tells us that, in public auctions, brother ought not to be separated from brother. (Seneca, *Controv.* 9, 3.) When a partition of property took place, Constantine introduced the humane principle of keeping together children and parents, brothers and sisters, wives and husbands. (C. 3, 38, 11 ; C. Th. 2, 25, 1.) The same principle was observed in the partition of inheritances. In another class of cases, similar deference was paid to natural feeling. Thus, if a family of slaves were sold, consisting of father, mother, and children, and some of them were suffering from disease, such as gave the buyer the right to return them, the buyer was allowed a choice of keeping all, or sending all back, but he was not allowed to break up the family. (D. 21, 1, 35 ; D. 21, 1, 39 ; D. 32, 1, 41, 2.)

4. It was a consequence of the relation between master and slave that neither could bring against the other any civil action, even for delicts.

If a slave wrongs his master, no action arises. For between a master and a person in his power no obligation can arise. And therefore, also, if the slave passes under another's power, or is set free, still neither against him nor against his new master, in whose power he now is, can any

action be brought. Whence it follows, that if another man's slave wrongs you, and afterwards comes to be under your power, the action falls through ; for under the changed circumstances it cannot be maintained. And therefore, even though he passes out of your power, you cannot bring an action ; just as a slave that has been wronged by his master cannot bring an action, not even when set free or transferred to another, against his master. (J. 4, 8, 6.)

II.—A SLAVE WAS A PERSON.

Much, and somewhat unprofitable, discussion has taken place as to whether a slave was a person. So far as the language of the Roman Law is any authority, there can be but one answer to the question. Both Gaius and Justinian include slaves among persons (*de personis*), and that is conclusive as to the Roman use of the word. But apart even from usage, the question cannot be called perplexing. If we throw out of account the case of corporate bodies, which are called persons in a figurative sense, there can, in law, be only three meanings of the word "person." A person may be defined—(1) as simply a human being ; or (2) as a human being upon whom are imposed legal duties ; or (3) as a human being who enjoys rights. In the second acceptation of the word, a slave was a person in the sphere of the criminal law, although scarcely so in the civil law. In the third meaning, as has been pointed out, a slave had a right to protection from harm, and so was a person even within the sphere of the civil law. The language of the juriconsults requires us to enlarge the word person so as to include slaves ; the distinction they drew was, a slave had no *caput*. (J. 1, 16, 4.) They meant that he had not freedom, citizenship, nor any family rights ; all which constitute the chief heads (*caput*) of status. (Austin, *Jurispr.* 364, 740.)

III.—ORIGIN OF SLAVERY..

Slaves (*servi*) are so called, because victorious generals order the prisoners to be sold, and so save them alive (*servare*) instead of killing them. They are called *mancipia* also, because they are taken from the enemy by the strong hand (*manu*). (J. i. 3. 3.)

The theory expressed by the Roman jurists, and taken from their writings into the *Institutes*, assumes a historical fact as an explanation of a social anomaly. Capture in war was a recognised mode of acquiring slaves, and this was projected into the past as the sole and exclusive origin of the inequality of slavery.

Whether they were justified in doing so has been disputed (Maine's *Ancient Law*, p. 163); but the main interest attaching to their explanation is the light that it throws upon their notion of the rights of belligerents. In modern times, the principle has been accepted by all civilised nations, that the employment of force against an enemy is no further justified than is required by his resistance; but in ancient times the state of war seems to have been regarded as destroying all moral ties, and leaving the vanquished entirely at the mercy of the conqueror. If the victor might without blame take the life of his prisoner, much more might he take his liberty. Slavery was thus held up as a mitigation of the horrors of war.

The contrast drawn between the law of nature and the law of nations is nowhere so sharply defined as in regard to slavery. In Greece, the distinction between natural law and law created by men, was one of the favourite subjects of disputation from the Sophists to Aristotle. The Stoics took up the law of nature as one of the forms of expressing their moral ideal. From them the conception found its way into Roman law, and thus Ulpian (D. 50, 17, 32) assigns to natural law the doctrine of the equality of all men. In several instances the jurists undoubtedly looked on the law of nations as containing the rules that nature prescribes; but in the present case, Florentine opposes the dictate of equality, ascribed to natural law, to the universal practice of all the nations with which the Romans had come in contact.

The justification of slavery that satisfied the classical jurists and Justinian, was known to Aristotle, without obtaining his approbation. To him the performance of the manual labour of a state by slaves seemed as much in the course of nature, as the use of hired labour and the separation of capital and labour appear to a modern economist. He acknowledged, indeed, that the relation of master and slave had not been all that could be desired, and that no one had been able to hit the happy medium in treating his slaves so as to avoid tyranny while yet securing obedience; but he pointed out that there must be a class of persons to do manual labour, whose bodies were fit for the purpose, and whose minds were fit for nothing better; and that it was no less an advantage to themselves than to their masters that they should be under government. Hence a typical family resolved itself, according to Aristotle's views, into three elements—the herile or working, the nuptial, and the

paternal or governing. To employ an analogy of a kind that did not seem to Aristotle unworthy of being regarded as an argument, the master ought to govern the slave just as the soul ought to govern the body. This theory, implying as it did a natural fitness of the slave for the servile condition, was of a more conservative tendency than the hypothesis of the Roman juriconsults, and afforded no stimulus to the process of manumission.

• IV.—DEGREES OF SLAVERY.

In the condition of slaves there are no degrees, but among freemen many. For they are either born free (*ingenui*), or made free (*libertini*). (J. 1, 3, 5.)

The Institutes, quoting Marcian (D. 1, 5, 5, pr.), affirm that there are no degrees of slavery. But the statement is not quite accurate. Convicts were called slaves (*servi poenae*), without in every respect being treated as such. A more important class is passed over in silence in the Institutes, as also in the Digest, but is revealed to us in the Code—the *coloni inquilini*, and *adscriptitii* or *censiti*. These were serfs, enjoying a certain amount of personal freedom, but fixed to the soil, compelled to cultivate it, and inseparable from it. As a link between the slavery of the ancient world and the modern system of free contract, the colonists possess a high interest, although, unfortunately, our information regarding their origin is very scanty. The first notice of them in the Code is in some constitutions of the Emperor Constantine. He made an enactment for the recovery of fugitive colonists A.D. 332 (C. Th. 5, 9, 1), and imposed a fine on those who knowingly harboured any of them. As time rolled on, new constitutions were issued, the principal of which are to be found in the Code. (C. 11, 47; C. 11, 49; C. 11, 50; C. 11, 51; C. 11, 52; C. 11, 63.)

Those serfs were distinguished from slaves, and classed as free-born (*ingenui*); but they could not remove from the place on which they were born, nor could they be sold apart from the land. (C. Th. 13, 10, 3.) They paid a rent to their owner, generally in kind. (C. 11, 47, 5.) The amount of the rent was fixed by custom. (C. 11, 48, 1.) A distinction existed among those serfs. Those called free colonists, *coloni liberi* or *tributarii*, *inquilini* (C. 11, 47, 12; C. 11, 47, 18), had rights of property as against the owner of the land, and were subject to few or no obligations beyond payment of the customary rent. (C. 11, 48,

1.) The other class, *adscriptitii* or *censiti*, had no property, and all their acquisitions were treated as *peculium*, the ownership of which belonged to their masters.

A constitution of Anastasius (C. 11, 47, 18) throws some light on the origin of this institution. It appears that a person who remained as a colonist for thirty years retained his property, but fell in other respects into serfdom. (C. 11, 47, 23, 1.) The usual mode, however, in which the state of serfdom was created, was birth. There were some doubts as to the exact rules to be followed, and Justinian declared (C. 11, 47, 21) that the rules determining the status of slavery should apply. If the mother was a colonist, *inquilina* or *adscriptitia*, the child followed her condition, whatever the status of the father. In like manner, if the mother was free the child was free, although the father were an *adscriptitius* or *inquilinus*. In this last case the father might be whipped by public authority and taken away from the woman, but still the children were free.

RIGHTS AND DUTIES.

A. Rights of the master.

As against third persons, the master's rights may be summed up under two heads; (1) a right to the exclusive possession; and (2) to the exclusive use of the slave.

I. Offences against possession. A slave was ranked as an object of moveable property, and might therefore be the object of theft or robbery. These offences will be more conveniently discussed under the law of ownership; but at this stage an offence peculiar to the law of slavery may be noticed—harbouring a runaway slave (*refugium, abscondendi causa, servo præstare*). (D. 11, 31, 2.)

It was an offence, exposing the wrongdoer to a penalty of double the value of the slave, to give refuge to a runaway slave, unless the motive was simple humanity for the slave, or some other adequate reason. (D. 11, 3, 5.) In addition to this provision under an edict of the Praetor, a *Senatus Consultum* imposed a fine, but gave pardon to those who, within twenty days, gave up the slave to the master or a magistrate. (D. 11, 4, 1, 1.)

II. Offences against the usefulness of a slave. Here again a slave, like other moveable property, was susceptible of damage; but in two ways a slave might be the object of a somewhat different wrong.

1. Corrupting a slave.

This is the offence of persuading a slave intentionally to do something that impairs his value. The Praetor says, "If it be alleged that a man has harboured a slave, male or female, belonging to another, or that he has with wrongful intent persuaded the slave to do anything to change him or her for the worse, against that man I will give a remedy for double the loss in the case."¹ It is, therefore, an offence to solicit a slave to do or conceive any mischief,—as to commit an *injuria*, or theft, or to run away, or to corrupt another man's slave, or to waste his time going to public shows, or to be seditious, or to interfere with his master's accounts (D. 11, 3, 1, 5), or to be disrespectful (D. 11, 3, 15) or contemptuous towards his master. (D. 11, 3, 2.)

2. *Injuria* done to a slave.

No *injuria* is regarded as an *injuria* to the slave himself, but always as an *injuria* to the master through the slave. Nor does it stand on the same footing as an *injuria* done to us through our children and wives. For aggravated offences only are recognised,—open affronts to the master. If, for instance, one scourges a stranger's slave, for this case an action (*formula*) is provided. But if he only reviles the slave in public (*convicium*), or strikes him with his fist, no action is open to the master [no *formula* is provided, nor is one readily granted.] (J. 4, 4, 3 ; G. 3, 222.)

An *injuria* is pre-eminently an affront to the dignity of the person; but a slave is so abject a creature, he has so little of the dignity of a freeman, that there is nothing to take away, nothing to diminish, nothing susceptible of contumely or *injuria*. Such is the starting-point of the Roman law. To a slave, as such, no *injuria* could be done.

In two ways harm might be done to a slave. He might be lamed or lose his eye, and so be less useful as a labourer; in other words, he might suffer the same kind of damage as any other species of property—a loss of utility or value. But a different kind of injury might be perpetrated. It was a point of honour with masters to reserve all ill-usage of their slaves to themselves, and to punish those who assaulted or insulted their slaves. The slave might, therefore, be viewed as a mechanical medium through which an insult could be transmitted to his master. In short, an injury to the slave

¹ *Ait Praetor. Qui servum servamve alienum alienamve recepisse, persuasisseve quid ei dicetur dolo malo, quo eum, eamve deteriore faceret; in eum quanti ea res erit, in duplum judicium dabo.* (D. 11, 3, 1, pr.)

might be intended as, and therefore might be, an injury to the master.

Illustration.

Stichus, a slave belonging to Sempronius, represents himself as a slave of Titius, or as a freeman, and is struck by Seius. Mela (*temp. Tiberius*) says, that inasmuch as Seius did not know that Stichus was the slave of Sempronius, he could not have meant to insult Sempronius; and if Seius would not have struck Stichus had he known who his master really was, he cannot be sued for *injuria*. (D. 47, 10, 15, 45.)

Such was the position of a slave according to the rules of the civil law; but the Praetor introduced a more liberal legislation. He gave an action to the master, when his slave had been whipped or subjected to torture without his consent by another person, even when the wrongdoer did not intend to insult the master. When the injury was trifling, as a mere verbal insult, the master had no action, unless by leave of the Praetor, or unless the insult were meant for him. (D. 47, 10, 15, 35.)¹ Ulpian states the case thus: If a slave is struck lightly or only abused, the Praetor will refuse to give an action to the master. If, however, his good name is seriously hurt by some act or writing, the Praetor will compare the position of the slave with the nature and extent of the injury, and decide accordingly to give or refuse an action. Thus it makes a material difference whether the slave is in a position of trust or confidence, as an overseer (*ordinarius*) or steward (*dispensator*), or whether he is a household drudge (*mediastinus*), or of bad character. (D. 47, 10, 15, 44.) This was the furthest limit of humanity that the Roman Law reached. For severe injuries, the master always, the slave never, had a remedy; for trifling insults, the master had an action only when the slave was made the medium of an insult to himself.

These principles will serve to explain the following passages from the Institutes:—

If an *injuria* is done to a slave owned in common, it is fair to assess the damage, not according to the share each owns, but according to the position (*persona*) of the masters: for the *injuria* is done to them personally. (J. 4, 4, 4.)

This rule, which proceeds upon the distinction between contumelious injury just explained, and damage diminishing the usefulness of property, is opposed to a statement taken from Paul in the Digest. (D. 47, 10, 16.)

¹ (D. 47, 10, 15, 34.) *Praetor ait: Qui servum alienum adversus bonos mores verberavisse de eo, injussu domini, quaestionem habuisse dicitur, causa cognita, judicium dabo.*

But if Titius has the usufruct in the slave, Maevius the ownership, then the *injuria* is looked on as done to Maevius. (J. 4, 4, 5.)

The distinction between usufruct and ownership will be explained fully hereafter ; for the present it is enough to observe that a person who has a usufruct has for a limited time (generally for his life) all, or nearly all, the rights that the owner has to the use and services of the slave.

But if an *injuria* is done to a freeman while in good faith in your service, no action will be granted you, but he will be allowed to proceed in his own name : unless, indeed, it was to affront you that he was beaten, for then to you also an *actio injuriarum* is open. And the same rule applies to another man's slave while, in good faith, in your service : for whenever an *injuria* is done to him in order to affront you, then you are allowed an *actio injuriarum*. (J. 4, 4, 6.)

This passage, taken from Ulpian (D. 47, 10, 15, 48), omits the final statement that the same rule applies to the case of usufruct. When a slave held in usufruct, or while really belonging to another, believed by the possessor of the slave to be his own (*bona fide*), was made the channel of contumely to the person to whom, for the time, his services were due, the action was brought by the person injured, not by the owner. But if the injury to the slave was more to him than to the master, then an action could be brought by the true owner, and not by the *bona fide* possessor or the usufructuary.

B. Duty of master in respect of wrongs done by his slave.

A wrong done to a slave was regarded solely as a wrong to the master ; in like manner, a wrong done by a slave was considered only as a wrong done by the master. Within the sphere of criminal law, the responsibility of the slave was recognised ; but in the civil law his personality in respect of third parties was submerged in that of his master.

The misdeeds of [a *filiusfamilias* or] a slave, such as theft [*bona vi rapta, damnum*] or *injuria*, give rise to *actiones noxales*. But in them the [father or] master [if he loses] is allowed to elect whether he will pay the damages assessed, or surrender the wrongdoer (*noxae dedere*). By *nox* is meant the body that has done the harm (*nocuit*) ; that is, the slave. *Noxia*, again, is the misdeed itself—the *furtum* for instance, the *damnum*, the *rapina*, the *injuria*. With perfect reason, the surrender of the offending body was made full satisfaction. For it was unjust that the offender's wickedness should bring on the [parents or] masters any loss beyond that of the offending bodies. (J. 4, 8, pr. ; G. 4, 75.)

The statement of the text applies when the wrongful act was done spontaneously by the slave, and had not received the sanction of the master. When a slave, with the knowledge of his master, kills another slave, the master must pay the whole damage, as if he had done the wrong himself, and he cannot escape by merely surrendering the slave. (D. 9, 4, 2 ; D. 9, 2, 44, 1.) The master is directly responsible, even when he does not encourage the slave, if he knows what he is doing,

and has the power to prevent him. (D. 9, 4, 4; D. 50, 17, 50; D. 9, 2, 45, pr.)

(1.) For what wrongful acts of the slave is the master responsible? His responsibility extends not merely to the delicts enumerated in the Institutes (theft, robbery, damage, injury), but also to other acts of force, fraud, or mischief. When a fraud not falling within the law of contract has been committed by a slave, the master can be sued, the slave being a *nox*. (D. 4, 3, 9, 4.) The slave is also a *nox* when he has corrupted another's slaves (D. 11, 3, 5, 3), or forcibly released a man who has been summoned before the Praetor, and is in the custody of a complainant (D. 2, 7, 1, 1), or has theftuously cut down another's trees. (C. 3, 41, 2.)

(2.) Limitation of the master's responsibility. If the master ceased to own the slave, he also ceased to be responsible. This was a consequence of the rule that the master could free himself by surrendering the slave. Hence the saying, the responsibility follows the slave: *Noxa caput sequitur*.

All *noxales actiones* follow the person (*caput*). For if [your son or] your slave has done a wrong (*noxia*, *nox*), as long as he is in your power (*potestas*), it is against you the action lies: or if he passes into another's power, then against that other. If he is set free [or becomes *sui juris*], the action must be brought against him directly, and there is no longer room for a surrender (*noxae deditio*). And conversely, a direct action may be changed into an *actio noxalis*. For if a free man does a wrong (*noxia*), and thereafter becomes your slave [if a *paterfamilias* does a wrong (*nox*), and thereafter suffers himself to become your son by *arrogatio*, or is made your slave]—and this may happen in some cases, as we have laid down in the First Book—at once the action, hitherto direct, becomes a *noxalis actio* against you. (J. 4, 8, 5; G. 4, 77.)

Illustrations.

Stichus, a slave of Maevius, commits a theft. Maevius sells him to Sempronius. It is against Sempronius that the remedy lies. (D. 9, 4, 7.)

Stichus corrupts another man's slave, and is abandoned by his master Titius. Titius ceases to be responsible. (D. 9, 4, 38, 1.)

Stichus, after running away from his master Titius, commits a robbery. So long as Titius does not recover possession of Stichus, he is not responsible. (D. 9, 4, 21, 3; Paul, Sent. 2, 31, 37.)

Stichus, a slave of Sempronius, commits a theft, and, before any action is brought against his master, dies. Sempronius cannot be sued. (D. 9, 4, 42, 1.)

Stichus has been pledged by Balbus with his creditor Titius, and, while held in pledge, insults Sempronius. Balbus the owner is responsible, not Titius the creditor. (D. 9, 4, 22, 1.)

Maevius gives his slave Stichus on loan to Caius, and Stichus commits a theft. The remedy is against Maevius the owner, not against Caius the borrower. (D. 9, 4, 22, pr.)

According to the statement of the text, a slave might be sued after manumission for delicts committed by him while a slave. But he was exonerated when he acted under the orders of his master, for then he was only an agent of the master, who remained answerable for the whole damage. (D. 44, 7, 20.)

Illustrations.

Stichus, in a brawl arising out of a lawsuit, assaults a person at the request of his master. Stichus is manumitted. The master may be sued as the instigator of the assault, but Stichus cannot. (D. 50, 17, 157, pr.)

Stichus, after committing a robbery unknown to Maevius his master, prevails upon Maevius to manumit him. Stichus may now be sued. [*noxa caput sequitur.*] (C. 4, 14, 4.)

Stichus commits a theft, and his master Julius coming to learn it, manumits him in order to escape responsibility. In this case the wronged party has a choice; either Stichus may be sued or Julius, but not both. (D. 9, 4, 12; D. 47, 2, 42, 1.) But if Stichus offered to defend the action, the master (Julius) escaped. (D. 9, 4, 24.)

INVESTITIVE FACTS.

A. Investitive Facts ascribed to the Law of Nations (*jus gentium*).

I. The offspring of a female slave belong to her master. *Ancilla* is any female slave. *Verna* is any slave, male or female, born in the master's house.

This rule is but a particular example of one of much wider application, governing the determination of *Status*, and which may be thus briefly stated: children born in wedlock have the same *status* that the father had at the moment of conception; children born out of wedlock have the same *status* as their mother at the moment of birth; but, in favour of liberty, a qualification was made, that if a mother was free at any moment between the conception and birth of the child, the child should be free. (Paul, Sent. 2, 24, 1-3; D. 1, 5, 19.)

The decision, that if a female slave conceives by a Roman citizen, and is set free before childbirth, then the offspring is born free, is a dictate of natural reason. And so if the mother is free at the time of their birth, the children are free. Nor does it matter by whom the mother conceived them, even though she was then a slave. The status of children regularly (*legitime*) conceived is determined by the time of conception, of children irregularly (*illegitime*) conceived, by the time of birth. (G. 1, 89.)

And with these rules the rule of the *Jus Gentium* agrees that the offspring of a slave-girl and a freeman is a slave, while the offspring of a free woman and a slave is free. (G. 1, 82.)

If the mother is free and the father a slave, the offspring is none the less free-born (*ingenuus*); and so, too, if the mother is free, while from the loose-

ness of her character there is uncertainty as to who is the father. And it is enough that the mother is free at the time of the birth, although a slave when she conceived. And on the other hand, if she is free when she conceives, and becomes a slave before childbirth, it is held that the offspring is born free, because the mother's misfortune ought not to harm a child still in the womb. And hence this question has been raised,—If a female slave, while pregnant, is set free, and again becomes a slave before childbirth, is the child a slave or free? And Marcellus is of opinion that it is born free, for it is enough for a child in the womb that the mother was free at any intervening time. And this is true. (J. 1, 4, pr.)

The same general rule was applied to determine whether a child was a Roman citizen or an alien (*peregrinus*). (See Appendix to Slavery.)

II. Persons captured in war are made slaves. (J. 1, 3, 4.) The capture must, however, be in war between belligerents. The forcible seizure of freemen by brigands or pirates did not constitute a legal capture giving a lawful title to them as slaves. Such captives remained free in law. (D. 49, 15, 24; D. 49, 15, 19, 2.)

B. Investitive facts special to the Roman Law (*Jure Civili*).

I. A Roman citizen who evaded inscription on the census (and thereby his military duty) lost his liberty (Cicero pro Caecina, 34). The quinquennial census was a republican institution, which ceased under the Empire. (Ulp. Frag. 11, 11.)

II. A thief taken in the act (*fur manifestus*) was by the law of the XII Tables punished capitally. For if free, he was scourged, and adjudged to the man from whom he had stolen. (G. 3, 189.)

This cause of slavery was extinguished when the Praetor substituted a penalty of fourfold the value of the thing stolen.

III. A judgment creditor (by the XII Tables) could take his debtor as a slave if he were unable to discharge his debt. (Aul. Gell. 20, 1.)

IV. The reduction of free women into slavery by the *Senatus Consultum Claudianum*. This enactment is said by Tacitus (Ann. 12, 53) to have been made in the reign of Claudius. It was abrogated by Justinian. (C. 7, 24, 1.)

And under the *Senatus Consultum Claudianum* there was a wretched mode of acquisition, *per universitatem*, viz. this:—When a free woman, in the frenzy of her passion for a slave, lost by that *Senatus Consultum* her very freedom, and with her freedom all her substance. But this we held unworthy of our age, and have therefore blotted it out of the laws of our state, and given it no place in our Digest. (J. 3, 12, 1.)

The reason assigned for this enactment by Theophilus was

that such connections interfered with the work of the slave. The master of the slave could send to any free woman cohabiting with his slave, and require her, in the presence of seven witnesses, to withdraw herself from his society. If she refused, a second, and even a third, formal warning (*denuntiatio*) was to be given. If the woman persisted in the cohabitation, the master could go before the Praetor or President of a Province (Paul, Sent. 21^a, 17), who, if satisfied of the facts as alleged, adjudged the woman to the master as his slave, with all her property.

V. Certain convicts were regarded as slaves (*servi poenae*).

Those condemned to fight with wild beasts were considered as slaves (D. 48, 19, 8, 11); but this punishment was suppressed by Constantine (C. 11, 43, 1). In the time of Justinian, prisoners sent to the mines (*in metallum*), or to help the miners (*in opus metalli*), were called slaves without a master. Hence even the Fiscus did not acquire any legacy left to them. (D. 48, 19, 17; D. 49, 14, 12.) The punishment of the mines was for life; those sent to aid the miners were not sentenced for life; and the children of women suffering the lighter punishment were freeborn. (D. 48, 19, 28, 6.) Justinian (Nov. 22, 8) abolished the class of *servi poenae*, and prohibited the infliction of slavery as a punishment for crime.

VI. The ingratitude of a freedman to his patron.

The duties of freedmen (*liberti*) to their patrons will be explained hereafter.

During the Republic a recission of liberty was unknown. In the time of Nero, the utmost severity that could be wrested from the Senate was the relegation of undutiful freedmen. Claudius ordered a freedman who had brought a false accusation against his patron to become again his slave. (D. 37, 14, 5.) Commodus sanctioned the same punishment as a last resource to break a recalcitrant freedman. (D. 25, 3, 6, 1.) From Ulpian and Paul we learn that it was seldom, and only for very grave offences, that a freedman forfeited his liberty. (D. 37, 14, 1; D. 4, 2, 21.) Constantine (C. 6, 7, 2) established the severe law that even for slight breaches of duty a freedman might be taken back into slavery, although we learn from a constitution of Diocletian and Maximian (C. 7, 16, 30) that a mere want of reverence (*obsequium*) was not enough to cause a forfeiture of liberty. The law was left in this state by Justinian.

VII. The fraudulent sale of a freeman.

A man may be made a slave by the civil law ; as when a freeman over twenty years of age suffers himself to be sold in order to get a share of the price. (J. 1, 3, 4.)

This law seems to have been established by Hadrian (D. 40, 14, 2, pr.) as a protection to purchasers. It was a rule of law that a sale of a freeman was void. Advantage was taken of this rule for the purpose of fraud. Two persons conspired together,—one of them represented the other as his slave, sold him, and got the price. Thereupon the person sold insists that the sale is void because he is freeborn. To check this fraud the above law was made. Freedom was not, however, rashly taken away, and it was only when four conditions concurred that the person fraudulently sold lost his liberty.

1. The person sold must not be under twenty years of age. But if a person just under twenty sells himself, and after reaching that age shares his price with his confederate, he is made a slave. (D. 40, 12, 7, 1.) 2. The person sold must have entered into the sale with the intention of sharing the price, and have actually done so. (D. 40, 13, 1 ; C. 7, 8, 1.) But if he restored the price to the purchaser, he was generally allowed to recover his freedom. (D. 40, 14, 2, pr.) 3. The person sold must have known that he was free. (C. Th. 4, 8, 2.) 4. The buyer must have been ignorant that he was free. (D. 40, 12, 7, 2 ; D. 40, 12, 33.)

DIVESTITIVE FACTS.

First, Liberation of slaves by the voluntary act of their master (*manumissio*).

Manumission is the giving a slave his freedom ; for as long as any one is in slavery he is placed under the *manus* and *potestas* of his master, and manumission frees him from the *potestas*. It takes its rise from the *Jus Gentium*. For by the *Jus Naturale* all were born free, and no manumission was known, since slavery was unknown. But after slavery came in by the *Jus Gentium* there followed the boon of manumission. And though nature gave all the one name of man, the *Jus Gentium* has divided men into three sorts :—Freemen ; and their opposite, slaves ; and a third sort, freedmen (*libertini*), who have ceased to be slaves. (J. 1, 5, pr.)

The forms of manumission varied at different times, and they may be arranged in three periods. The first period embraces the whole of the Republic ; the second, the Empire ; while the changes made by Justinian form an epoch different from both.

This division is nearly, although not quite, exact. During the Republic, the modes of manumission were Formal, either by means of a fictitious law-suit, or by the solemnities of the testament. They had the double effect of releasing a man from slavery, and making him a Roman citizen. These two effects were not necessarily conjoined. One might be free without being a Roman citizen. But the ancient law contemplated no other manumission than that which added to the roll of citizens and soldiers. The state was represented by means of its magistrates or assemblies as a consenting party to the manumission, and hence this species of manumission is often called PUBLIC (*legitima, solemnis, justa manumissio*).

If a master, without resorting to one of these ancient solemnities, expressed in the presence of witnesses (*inter amicos*) his intention to give freedom to his slave, and followed up this declaration by allowing the slave to dwell in freedom, in strict law the indulgence and good intentions of the master availed the slave nothing. Unless manumitted in proper form, he remained a slave, and equally so if the act of manumission were imperfectly performed. The hardship, however, of turning back into slavery a man allowed to live in freedom by his master, merely on account of a technical flaw or defect, is obvious; but it was not until after considerable experience of the injustice of the law, if we may trust Tacitus (Tac. Ann. 13, 27), that the Praetor interposed. The mode and extent of his intervention are characteristic. He went just so far as was necessary to satisfy the conscience, to prevent the scandal of a man openly enfranchised being again, at the caprice of his master or master's heir, dragged back into slavery (*Cervidii Scaevolae* (?) *Fr. Dosith.* 5); but he went no further, and gave the half-enfranchised slave no rights of property. He secured him personal freedom, but nothing more. Such continued to be the law until A.D. 19, when by the *lex Junia Norbana* all slaves, whose personal freedom was guaranteed by the Praetor, were raised to the condition of Latin colonists. (See Book II. Div. II., *Latini Juniani*.)

During the Empire, from A.D. 19, an informal manumission operated as a divestitive fact in regard to slavery, but not as an investitive fact of citizenship. Formal manumission continued to exist, and to raise the slave to the dignity of Roman citizenship. These two kinds of manumission—the formal and the informal—co-existed down to the time of Justinian. Long

previously, however, in the reign of Caracalla, the privileges of citizenship were extended to all the subjects of the Emperor. Justinian finally enacted that a slave, whether manumitted formally or informally, should be a citizen; and thus the class of *Latini Juniani* and the distinction between formal and informal manumission passed away. There are accordingly three stages to remark in the history of manumission. In the first, the forms of manumission were strict and ceremonial, and they conferred the title of citizen; in the second, the inconveniences arising from a strict adherence to these forms became a serious evil, and through the edict of the Praetor and the *lex Junia Norbana* slaves released by their masters informally were protected in their liberty and raised to the condition of Latin colonists; lastly, the ancient forms were virtually abrogated, and any expression of the master's will, if attested as required by law, sufficed to liberate the slave.

Another distinction between formal and informal manumission is worthy of remark as illustrating the peculiar narrowness and formalism of the ancient law. If a slave were formally manumitted, although the master were induced to do so by fraud or compelled by force, the manumission was nevertheless valid. A master, who, being threatened with death, consented to authorise the inscription of his slave on the census, could not rescind the act, and had no remedy but an action for damages against the person who threatened him. (D. 4, 2, 9, 2.) According to a rescript of Gordian, a master under twenty years of age, who was fraudulently induced to manumit a slave, could not rescind the manumission, and could only sue the person by whose fraud he was led to prejudice his interests. (C. 2, 31, 2; C. 2, 31, 3.) But an informal manumission, inasmuch as it derived all its efficacy from its being the free act of the master, was void if it were procured by force or fraud. This distinction may be compared with the law relating to formal and informal contracts. (Book II. Div. I. Sub-div. II.)

A. MODES OF MANUMISSION.

a. Formal Manumission.

I. By the *vindicta* (*per vindictam*).

The name *vindicta* is given either from the rod employed by the lictor in the ceremony, or, as Theophilus says without any probability, from one Vindicus, who gave information of a conspiracy, and was rewarded by being the first to enjoy a public

manumission. It was a fictitious suit brought before one of the higher magistrates (consul, praetor, proconsul, or president of a province—C. 7, 1, 4), in which judgment was given in favour of the liberty demanded on behalf of the slave with the consent of the master. The ceremony did not require to be in court.

Masters can manumit slaves [over thirty] at any time ; even on the street, when, for instance, the praetor, or proconsul, or provincial governor is going to the bath or the theatre. (J. 1, 5, 2 ; G. 1, 20.)

The part of the *adsertor libertatis*,—the plaintiff in a suit for freedom,—was taken by the lictor. The master laid hold of the slave's hand, or some other part of his body, and said, "I wish this man to be free;" and thereupon turned him round and let him go. (Livy, 34, 16.) A rod (*vindicta* or *festuca*) was then laid on the slave by the lictor, and the Praetor said to him, "I declare that you are free by the Law of the Quirites;" and to the lictor, "According to your plea, as I have given judgment, behold, he is given to you." The lictor then touched the slave with the rod. In the time of Hermogenian (circ. A.D. 287) the solemn words were unnecessary (D. 40, 2, 23); and Ulpian tells us that in his time even the presence of the lictor was not essential. (D. 40, 2, 8.)

Corporations (*civitates, collegia, &c.*) could not manumit their slaves by the *vindicta*, because it was a ceremony in which the master himself must appear, and could not act by an agent (*procurator*). But Diocletian and Maximian refer to a *lex Vestibulici* (passed probably in the first century of the Christian era), by which slaves of municipalities could be manumitted. (C. 7, 9, 3.) Hadrian (C. 7, 9, 2) tells us that slaves belonging to corporations could be freed with the consent of the president of the province, on a decree by the local magistrates (*duumviri*).

II. Enrolment of a slave on the census.

At the quinquennial census, a slave whose name was registered as a citizen by the command of his master became free. (Ulp. Frag. 1, 7.) There was a doubt as to whether the freedom of the slave dated from the day when his name was inserted, or from the close of the quinquennial period. (Cic. de Orat. 1, 40.) The census was accompanied by a *lustrum*, or sacrifice of purification, and thus the ceremony had a religious as well as political import. (Cervidii Scaevolae (?), Fr. Dosith 17^B.) This mode of manumission was necessarily confined to Rome, and could have

been of little practical use, as the occasion came only once in five years. The master must be Quiritarian owner to be able to insert the slave's name on the census. (Cerv. Scaev. (?) Fr. Dos. 17.) After Vespasian no census was held for 200 years. Decius held one, the last, A.D. 249.

III. By testament or codicils.

Surprise may be excited at the enumeration of wills as a form of *public* manumission, inasmuch as secrecy and privacy are the most obvious characteristics of a will. The explanation is found in history. At first wills were made in the form of a law passed by the *Comitia Curiata* (Book III., Forms of Wills), and were then not only open, but sanctioned by the state. At such a time a will was a public mode of manumission, and it retained that advantage after its own nature had been completely changed.

Manumission by the *vindicta* was irrevocable; but a gift of liberty in a will could be revoked at any time during the life of the testator.

The slave who was ordered by his master's will to be free, did not acquire his liberty from the moment of his master's death, but only when some one became heir under the will. (Ulp. Frag. 1, 22.) Hence, if the heirs named in the will refused to accept the inheritance, the gifts of liberty were made in vain. The introduction of codicils extended the testator's power: it enabled him to impose on the heirs who took in default of his will an obligation to manumit a slave. (D. 40, 4, 43.) This leads to an important distinction between a direct bequest of liberty and a bequest indirectly, or by way of trust (*fidei commissum*).

1. Comparison of direct (*directa, justa*) and *fidei-commissary* bequest of freedom.

1°. A slave to whom is bequeathed his freedom directly, becomes free as soon as any person named heir in the will enters on the inheritance. But in a bequest by way of trust the slave does not obtain his freedom until the person to whom he is committed manumits him by the *vindicta*.

2°. A slave directly set free by will—for instance, in the form, "Let Stichus my slave be free," or, "I order that Stichus my slave be free"—becomes the testator's freedman. (G. 2, 267.)

Freedom may be given a slave by a trust (*fideicommissum*); if the heir or legatee or trustee (*fideicommissarius*) is charged to manumit him (J. 2, 24, 2; G. 3, 263).

The formality on which Gaius insists was taken away by a constitution of Theodosius and Valentinian (C. 7, 2, 14) ; and henceforth a direct bequest of liberty might be made even in Greek.

In a direct grant of freedom, the testator charges no one to manumit the slave, but by his own testament wills that the slave shall thereby be made a freeman. (J. 2, 24, 2.)

3°. No slave can be directly freed by will, unless the testator owned him [*ex jure Quiritium*] both when he made the will and when he died. (J. 2, 24, 2 ; G. 2, 267.)

But it does not matter whether the slave, whose manumission is given by *fideicommissum* by the testator, is his own, or belongs to his heir or legatee, or even to an outsider. A slave, therefore, that belongs to another, ought to be bought from him, and then manumitted. If his master refuses to sell him, his freedom is gone, because for freedom no price can be reckoned. (J. 2, 24, 2 ; G. 264, 265.)

Such was the law in the time of Gaius, but a more favourable rule prevailed in the time of Justinian.

If his master refuses to sell him, as he may, if he has taken nothing under the will that gives the slave his freedom, then the trust for freedom is not at once gone, but is only put off. For as time goes on, whenever there is a chance to buy the slave, his freedom may be secured. (J. 2, 24, 2.)

4°. A slave manumitted under a trust becomes the freedman, not of the testator, even if the testator was his master, but of the manumitter. But he whose freedom is directly assured by will, becomes the testator's own freedman—a *libertus orcinus*, as he is called. (J. 2, 24, 2 ; G. 2, 266.)

The rights of the patron were of considerable value, and it was therefore important to determine who was to be patron.

5°. Direct bequests could be made only by will, or by codicils confirmed by will. Fideicommissary bequests could be imposed by codicils not confirmed by will, or by codicils without any will being made ; in which case the heir to the intestate was bound to manumit the slaves named in the bequest. (D. 40, 4, 43.)

2. The bequest of liberty may be conditional or unconditional.

A slave to whom freedom is given in his master's will, subject to the fulfilment of any condition, is called a *statuliber* ; because, according to Ulpian (Ulp. Frag. 2, 2), while the slave remains the slave of the heir until the condition is fulfilled, as soon as the condition is fulfilled he becomes free (*statim liber*). One is also a *statuliber* whose freedom is to begin at a given time after the testator's death. (D. 40, 7, 1.) If the time mentioned exceeds the duration of a human life, or the condition cannot be fulfilled, then the bequest is (by Paul) treated as void, because the testator must have written it in mockery. (D. 40, 7, 4, 1.) This construction, so unfavourable to freedom, was not sanctioned by Justinian, who directed that an impossible condition in gifts of liberty should be treated as void (*non*

scripta). (J. 2, 14, 10.) A *statuliber*, until the condition is fulfilled, is in all respects a slave of the heir (D. 40, 7, 29); and children born of a female slave are slaves. (C. 7, 4, 3.) The heir may sell the slave, but cannot deprive him of the benefit of the condition. (C. 7, 2, 13; Ulp. Frag. 2, 3.)

Those who are manumitted with the intention of defrauding creditors are *statuliberi* so long as it is uncertain whether the creditors will insist on their right to have the bequest of freedom cancelled. (D. 40, 7, 1, 1.)

IV. In the Church. (J. 1, 5, 1.)

In the enactments of Constantine we may trace signs of a disposition to facilitate the termination of slavery by the manumission of slaves. A declaration of the master, in presence of the congregation, to the bishop, of his desire that the slave should be free, operated as a manumission. The declaration was recorded in writing. (C. 1, 13, 1; C. 1, 13, 2.)

β. Informal Manumission.

I. An oral declaration of freedom in the presence of witnesses (*inter amicos*) (J. 1, 5, 1) was the oldest form of private manumission, and was in use during the Republic. Justinian fixed the number of witnesses at five, and required the declaration of manumission to be written, and attested by the witnesses or by notaries (*tabulariis*) for them. (C. 7, 6, 2.)

II. By letter (*per epistolam*). (J. 1, 5, 1.) In this case Justinian also required the attestation of five witnesses. (C. 7, 6, 1.)

III. It was a custom for slaves manumitted by will to attend the funeral of their deceased master, wearing the cap of liberty (*pileus*). Advantage was taken of this custom to give a false impression of the liberality of the deceased, by making slaves who were not manumitted appear at the funeral with the cap of liberty. This form of ostentation was put an end to by enacting that slaves permitted to wear the cap of liberty at the funeral of their master, by the direction of the deceased, or with the consent of the heir, or who stood on the funeral-couch and fanned the corpse, should obtain their freedom. (C. 7, 6, 5.)

IV. A female slave who received a dowry (*dos*) from her master, and was given by him in marriage to a freeman, acquired freedom without any formal declaration. There must, however, be a written instrument giving the dowry. (C. 7, 6, 9.)

V. Cato wisely wrote, as the ancients tell us, that slaves, if adopted by their masters, are thereby freed. And, in deference to this opinion, we too, by

our constitution, have decided that a slave to whom his master has by a public process given the name of son is free, although this is not enough to give him the rights of a son. (J. 1, 11, 12.)

VI. If the master gave the title-deeds of the slave to him, or destroyed them, with the intention of manumitting the slave, in the presence of five witnesses, the slave obtained his freedom. (C. 7, 6, 11.)

Other modes were recognised as sufficient to make a slave a Latin (*Latinus Junianus*), (one of which, sitting at table with his master, is mentioned by Theophilus), but they were all abrogated by the same constitution that abolished the Latin class of freedmen. (C. 7, 6, 12.)

B. RESTRAINTS ON MANUMISSION.

During the Republic, a master could manumit as many slaves as he pleased, either during his life or by his will. But in the beginning of the Empire, the self-interest of the master appears not to have been considered sufficient security against reckless manumission; and it was alleged that slaves more frequently gained their freedom by pandering to the vices of their masters, or assisting their political conspiracies, than by the steady practice of virtue and industry. (Dion. Halicarn. Antiq. Rom. 4.) Whatever truth may be in this statement, restraints were imposed in the interest of the master himself, or of his heirs, or of his creditors.

I. By the *lex Julia de adulteriis*, a woman, after separation from her husband by divorce, was prohibited from selling or manumitting a slave for sixty days (D. 40, 9, 14, 1)—a prohibition thought by Ulpian to be very hard. (D. 40, 9, 12, 1.)

II. Restraints introduced by the *lex Ælia Sentia*, A.D. 4.

1. This law prohibited manumission in fraud of creditors.

It is not every one that wishes to manumit that is allowed to do so. For a manumission to defraud creditors [or a patron] is void; because the *lex Ælia Sentia* bars the freedom. (J. 1, 6, pr.; G. 1, 36, 37.)

And, finally, it must be known that the provision of the *lex Ælia Sentia*, that slaves manumitted in order to defraud creditors shall not be made free, applies to aliens too. This the Senate determined at the instance of the late Emperor Hadrian. But the rest of the rules laid down by that statute do not apply to aliens. (G. 1, 47.)

What is a fraud upon creditors?

A man manumits to the fraud of his creditors, if at the very time of manumission he is insolvent, or if to give freedom to his slaves will make him an insolvent. Yet it is the prevailing opinion, that unless the manumitter had, further, the intention to defraud (*animus fraudandi*), the gift of freedom

is not barred, even though the goods are not enough for the creditors. For often men's fortunes seem larger to their hopes than they are in fact. We see, then, that to bar the gift of freedom there must be a double fraud upon the creditors,—a fraud in intention on the part of the manumitter, and a fraud in fact, for the goods must prove insufficient for the creditors. (J. 1, 6, 3.)

There must concur both design (*consilium*) and fraudulent result (*eventus*). (D. 42, 8, 15.) *Creditor*es are any persons having an action against the manumitter. (D. 40, 9, 16, 2.)

Illustrations.

X owed money to A, and knowing that he was insolvent, manumitted several slaves by his will. Afterwards he paid A, and became indebted to B, and died. Julian decides that the slaves are free, because X intended to defraud A and did not, and defrauded B without intending it. Now both intention and actual defeat of the creditor must go together. (D. 42, 8, 15.) A must, however, not have been paid off with money got from B. (D. 42, 8, 16; D. 40, 9, 25.)

X was worth 1000 *aurei*, but thought he had only 300. He was 400 *aurei* in debt. To defeat his creditors he manumitted his slaves; but inasmuch as they will be paid in full, the manumission is valid. (Theoph. J. 1, 6, 3.)

A, being worth 420 *aurei*, and owing 400 *aurei*, with the intention of defeating his creditors, manumits B, who is worth 20 *aurei*, and C, D, each worth 10 *aurei*. B will remain free, because he was first manumitted, and his manumission does not defeat the creditor; but C and D will remain slaves. (D. 40, 9, 24.)

A is worth 50 *aurei*, and he owes his creditors 35 *aurei*. A manumits B, worth 20 *aurei*, and C worth 15 *aurei*, with the object of defrauding his creditors. Here B, although first manumitted, cannot be free, because the creditors would be defrauded; but as C is worth exactly 15 *aurei*, and his manumission does not interfere with the creditors, C will obtain his freedom in preference to A. (D. 40, 9, 24.)

EXCEPTION.—A master is allowed, if insolvent, to set his slave free by will, and appoint him his heir. And in that case the slave becomes both free and his sole and compulsory heir, if only there is no other heir under the will. And that may be because no one was designated as heir, or because he that was designated, on whatever ground, did not become heir. This is a provision of the same *lex Ælia Sentia*, and a righteous provision. For it was highly necessary to look forward to the case of needy men, to whom no other one would become heir, and to see that a man should have his own slave as a necessary heir; for then he would satisfy the creditors: or if not, the creditors might sell the goods of the inheritance in his slave's name, and so the deceased would suffer no disgrace (*injuria*). (J. 1, 6, 1.)

And the rule of law is the same, even if no mention of freedom is made when the slave is appointed heir. And our constitution has settled this, not only in the case of an insolvent master, but generally; for we pay a regard to humanity that formerly was unknown. And so now the very entry of the slave as heir of itself gives him his freedom. For it is not likely that the master's wishes were, that the heir he himself chose (though he omitted to give him freedom) should remain a slave, and that thus he should have no heir. (J. 1, 61, 2.)

2. A master under twenty years of age cannot manumit a slave, except under certain restrictions.

By the same *lex Ælia Sentia* a master under twenty is not allowed to manumit except by *vindicta*, and that only after making good a valid reason to the satisfaction of the Board (*Consilium*). (J. 1, 6, 4; G. 1, 38.)

And even if he wishes to make him a Latin, still none the less he must make good a reason (*justa causa*), to the satisfaction of the Board, and then manumit before friends (*inter amicos*). (G. 1, 41.)

Effect of the restraint on the power of testation.

Since then the power of manumission, in the case of masters under twenty, was by the *lex Ælia Sentia* expressly limited, it followed that a master that had completed his fourteenth year, although he could make a will and therein appoint his heir and leave legacies, yet could not, so long as he was under twenty, give a slave his freedom. Now it was unbearable that a man that could by will dispose of all his goods was not allowed to give one slave his freedom. And therefore we allow him, as he disposes of all else, to dispose of his slaves too, according to his last wishes (*in ultima voluntate*), as he pleases; so that he can set them free. But freedom is beyond all price; and hence, in old times, it was forbidden to free a slave before the master reached his twentieth year. We, therefore, choose a middle path, and give a master under twenty leave to free his slave by will only if he has completed his seventeenth and entered on his eighteenth year. For since in old times men of this age were allowed to plead, even on behalf of others, why should we believe that their soundness of judgment will fail them when they come to give freedom to their own slaves? (J. 1, 6, 7; G. 1, 40.)

Justinian afterwards reduced the age from seventeen to fourteen. (Nov. 119, 2.)

A person under twenty was restricted from any mode of alienation (subject to the amendment of Justinian) except by the *vindicta*, with the consent of the Board, on definite legal grounds.

1°. The constitution of this Board.

The Board (*Consilium*) that is consulted, consists, in Rome, of five senators and five Roman knights above the age of puberty; in the provinces, of twenty *recuperatores*, Roman citizens. In the provinces it meets on the last day of the assize; but at Rome there are fixed days for manumissions before the Board. (G. 1, 20.)

The *Conventus* or assizes were held periodically in the provinces. On the last day of the assize the President took his seat on the tribunal, and along with his twenty *Recuperatores* [see Book IV., *Recuperatores*] heard the cases for manumission. At Rome the Praetor presided over the Senators and Equites. (Theoph., *Inst.* 1, 6, 4.)

2°. The legal grounds of manumission.

Valid reasons for manumission are such as these—that the slave to be manumitted is the father or mother, or son or daughter, or brother or sister by birth, or the *paedagogus* or nurse, or teacher, or foster-child, or foster-brother, of the manumitter. Or again, that the slave is to become his agent or his wife; provided only that the wife must be married within six months, unless there is some valid reason to bar the marriage, and that the agent

must not be under seventeen at the time of manumission. But if the reason is once approved, be it true or false, the approval cannot be withdrawn. (J. 1, 6, 5, 6.)

. The reasons we set forth above in treating of slaves under thirty apply to this case too. And conversely, the reasons given in the case of a master under twenty may be extended to the case of a slave under thirty. (G. 1, 19, 39.)

How, asks Theophilus, could a person be a freeman and a Roman citizen, and be the owner of his parents as slaves? This might happen in several ways.

A father, B mother, and C son, are slaves of D. D dies, making C free and his heir. A and B will be slaves of C.

A has two children, B a boy, and C a girl, by his female slave. B and C are of course slaves, their mother being in slavery. A makes B his heir. C will be the slave of B.

A has a legitimate son B, and C a daughter by his female slave. A dies. B inherits, and C becomes the slave of B.

3. The slave must be thirty years of age.

The requirement as to the age of a slave was introduced by the *lex Ælia Sentia*; for that statute enacted that slaves under thirty should not, on manumission, become Roman citizens, unless, indeed, they had been freed by *vindicta* after a valid reason for the manumission had been approved by the Board. (G. 1, 18.)

If the slave manumitted was under thirty, Gaius says he became a Latin (§ 29, 30). The prohibition, therefore, of the law was not absolute, as in the case where the master was under twenty; and a manumission not complying with its terms was not wholly void, but had the effect of a private mode of manumission. Ulpian (*Frag.* 1, 12) states that to be the law when the manumission of a slave under age was by will; but that if it were by the *vindicta* it was wholly void,—unless, as has been suggested, the passage is not complete; but the point is unimportant. When Justinian abolished the class of Latin freedmen, the restraint on the age of the slave manumitted was tacitly repealed, and in the Institutes no mention is made of it.

The grounds that will justify manumission by a master under twenty would suffice for the manumission of a slave under thirty. (G. 1, 39.)

EXCEPTION.—Moreover, a slave under thirty may, when manumitted, become a Roman citizen, if manumitted by an insolvent master who makes him free and his heir by will; provided always there is no other slave whose name comes before his in the like position, and that there is no other heir under the will. This is due to the *lex Ælia Sentia*. And Proculus is of opinion that we must lean to the side of freedom, and hold the rule the same in the case of a slave that is named as heir without any mention of freedom. (G. 1, 21, as restored.)

Since by the *lex Ælia Sentia* the slave whose name is written first as heir alone becomes a Roman citizen, it was held that, if a man were to name as heirs his bastards by a female slave, all would remain slaves, for his words do not show who is to stand first; and that the estate should lose more than one would be a fraud upon the creditor. And at last, a *Senatus Consultum*, appended to the *lex Furia Caninia*, provided that it should not be in a debtor's power by such devices to evade the statute. (G. 1, 21A, as restored.)

III. And further, the *lex Furia Caninia* [A.D. 8] sets a fixed limit to the manumission of slaves by will. (G. 1, 42).

The owner of more than 2, and not more than 10, is { allowed to free any
number not exceeding $\frac{1}{2}$

" 10, " 30, " $\frac{1}{3}$
" 30, " 100, " $\frac{1}{4}$

And lastly, " 100, " 500, " $\frac{1}{5}$

And the statute pays no heed to larger owners, so as to fix any proportionate part. But it enjoins that no man be allowed to manumit more than 100. On the other hand, too, if a man has but one slave in all, or two only, the law makes no provision for that case, and his power to manumit is unrestrained. (G. 1, 43.)

But what we have said as to the number of slaves that can be manumitted by will, must be taken in this sense,—that in each number, where only one-third, one-fourth, or one-fifth can be freed, one may always manumit as many as are allowed to the lower number that goes before. The statute itself so provides. For clearly it would be absurd that the master of ten slaves might free five—the half, namely, of all he has; and then that the owner of twelve could free no more than four. But those that have more than ten, and not more than thirty, may manumit any number not exceeding five, the number allowed to those that have but ten. (G. 1, 45, as restored.)

And if a testator exceeds these limits, but arranges the names of the slaves he frees in a circle; then, since no order of manumission is found, none will be free. For the *lex Furia Caninia* annuls all such evasions. There are two special *Senatus Consulta* that annul all the devices framed to evade that statute. (G. 1, 46, as restored.)

To manumission not by will this statute does not apply at all. Those therefore that manumit by *vindicta*, or *census*, or among friends (*inter amicos*), may free their whole household if there is no other ground to bar their freedom. (G. 1, 44.)

The *lex Furia Caninia* set fixed limits to the manumission of slaves by will. As this was a bar to freedom, and somewhat invidious in its distinctions, we have resolved on its abolition. For it was inhuman enough that during his life a man might give freedom to all his household (unless there was some other ground to bar their freedom), but on his deathbed should be deprived of all such power. (J. 1, 7, pr.)

Second, Involuntary Divestitive Facts. Freedom given to the slave by way of forfeiture to the master or reward to the slave.

I. When a sick slave was abandoned by his master and recovered, Claudius declared that the slave should be free. (D. 40, 8, 2.)

II. Justinian applied the same remedy when the master exposed an infant slave. (C. 1, 4, 23; Nov. 153.)

III. When a female slave, sold under a condition that she should not be made a prostitute, was let out by her master for that purpose, her former master could demand her freedom. (D. 40, 8, 7.) Theodosius and Valentinian (A.D. 428) extended this relief to every case where the slave was made a prostitute against her will. (C. 1, 4, 12; C. 1, 4, 14.)

IV. A master who maliciously allowed a freeman to marry his female slave under mistake forfeited his slave. (Nov. 22, 11.)

V. Slaves of heretics, or pagans, or Jews, by accepting Christianity, were released from slavery; and even if the masters followed them, and were admitted into the Church, they were not allowed to take back their slaves. (C. 1, 3, 56, 3.)

VI. A slave who disclosed the assassin of his master was regarded as a freedman of his master (*libertus orcinus*). (D. 40, 8, 5; C. 7, 13, 1.)

VII. Constantine enacted that a slave who procured the conviction of coiners of bad money should be free, and that the imperial exchequer should compensate their masters. (C. 7, 13, 2.)

VIII. He also gave a slave liberty who disclosed a rape that had been concealed or compromised. (C. 7, 13, 3.)

REMEDIES.

A. REMEDIES IN RESPECT OF RIGHTS AND DUTIES. (A) RIGHTS OF THE MASTER.—As between the slave and master there were no actions; but the Prefect of the city heard complaints made by slaves against their master when they were left without sufficient food, or ill-used. (D. 1, 12, 1, 1; D. 5, 1, 53.) In some cases of misconduct the master was obliged to sell the slave; in others, the slave was forfeited and acquired his freedom.

As against third parties, in addition to the usual actions for delicts (*actio furti*, *vi bonorum raptorum*, *damni injuria*, *injuriarum*), two remedies are specially applicable to slaves.

1. *Actio de servo corrupto*.

1°. By whom could the *actio de servo corrupto* be brought?

The owner (*dominus*) had the action, even when the slave was in pledge (D. 11, 3, 5), and it was not extinguished by the manumission of the slave. (D. 11, 3, 5, 4.)

2°. The measure of damage. The damages are double the amount of the depreciation in the value of the slave. (D. 11, 3, 5, 2.) It was the duty of the judge who heard the cause to estimate how much that was. (D. 11, 3, 14, 8.) Thus the compensation or penalty paid by a master for a wrong done to a slave may be recovered from the person who has corrupted the slave—that is, induced him to do the wrong—whether such person has benefited by it or not. (D. 11, 3, 14, 7; D. 11, 3, 10.)

3°. Although of Praetorian origin, the action is perpetual, not temporary. (D. 11, 3, 13.)

4°. It may be brought by the heirs of the owner, but not against the heirs of the wrongdoer, because a penal action never lies against the heirs of a wrongdoer. (D. 11, 3, 13.)

2. Special procedure in regard to fugitive slaves. Besides the edict of the Praetor (*de servo corrupto*), a Senatus Consultum imposed a fine for harbouring fugitive slaves (D. 11, 4, 1, 1); and Constantine enacted that he who did so must return the slave with another of equal value, or 20 *solidi*. Masters in search of fugitive slaves must obtain written authority from the Emperor to the magistrates, who thereupon were liable to a penalty of 100 *solidi* if they did not give their help. (D. 11, 4, 1, 2.) Whoever apprehended a fugitive slave was bound to deliver him up to the municipal magistrates, or other public officer. (D. 11, 4, 1, 3; D. 11, 4, 11, 6.) If the master could not be found, he was sold. (D. 11, 4, 4.) Mere fugitation was not treated by the law as a crime, unless the slave passed himself off as free (D. 11, 4, 2), or was caught trying to escape to a foreign country. (C. 6, 1, 8.)

(B) DUTIES OF THE MASTER—*noxalis actio*.

1. Origin.

Noxales actiones have been established both by statutes and by edict. By statutes, as for theft by the XII Tables,¹ and for *damnum injuria* by the *lex Aquilia*. By the Praetor's edict as for *injuria* and robbery. (J. 4, 8, 4; G. 4, 76.)

2. Damages.

A master sued in a *noxalis actio* on account of his slave may free himself by surrendering the slave (*noxae dedendo*) to the plaintiff. And yet such a render is a final transfer of all his rights as master. If, however, the slave can find money to compensate the new master to whom he is surrendered for the damage (*damnum*) sustained, then by the Praetor's help, even against the new master's will, he gains his manumission. (J. 4, 8, 3.)

If therefore the judge is trying a *noxalis actio*, and if it shall appear that judgment must be given against the master, it is his duty to give it in the following form:—Publius Maevius I condemn to pay to Lucius Titius ten *aurei*, or to surrender the offender (*noxam dedere*). (J. 4, 17, 1.)

3. When the master affirmed that the slave was not under his control (*potestas*), the Praetor gave an election to the plaintiff, either to compel the defendant to declare upon oath that the slave was not under his control, and that he had not parted with the control to defeat the plaintiff, or to accept an action not involving the surrender of the slave (*noxae deditio*.) (D. 9, 4, 21, 2.) If the defendant will not take the oath, it is the same as if the action were undefended (D. 9, 4, 21, 4); but if he swears, he is relieved until such time as the slave comes under his control. (D. 9, 4, 21, 6.)

4. If the master did not deny control over the slave, whether he produced the slave or not, the action proceeded. If the slave was absent without the fault of the master, the latter must defend the action, and give security to produce him when he returns. (D. 2, 9, 2, 1.)

B. REMEDIES IN RESPECT OF THE INVESTITIVE FACTS, or the procedure to be adopted by a master in claiming his slave.

1. The action by which a person claiming to be the owner, or to have an interest in another as a slave, demanded that he should be given up to him, was called a *liberalis causa*.

1. This action might be brought not only by a person claiming as owner, but by any one who had an interest in the work of the alleged slave (*fructuarius*, D. 40, 12, 8; D. 40, 12, 12, 5.)

¹ *Si servus furtum facit noxae nocuit.* (D. 9, 4, 2, 1.)

2. By the law of the time of the XII Tables, the person claimed as a slave could not defend himself, but must be represented by a friend acting as defendant, and who was called the claimant for freedom, *adsertor libertatis*. (C. Th. 4, 8, 1.) The *adsertor* took up the defence at his own risk, and was obliged to find security for the delivery of the *res* defendant to his master, if the suit should be so decided. If he failed, he paid the costs. On the other hand, the person claiming the slave paid a penalty if he failed. (Paul, Sent. 5, 1, 5.) In three cases Theodosius provided that the defendant might appear without an *adsertor* when he had been in possession of freedom for twenty years, or had held a public office, or had lived openly in the same place with the person claiming him as slave. (C. Th. 4, 8, 5.) Finally, Justinian abolished the office of *adsertor*, and allowed a person, whether claimed as a slave or claiming to be free, to be sued or to sue in his own name. He provided, moreover, that a person living in freedom, whom it was sought to reduce into slavery, could act by a procurator; but a person in slavery must appear and sue on his own behalf. (C. 7, 17, 1.)

3. An action could not be brought more than once by the same claimant against the same defendant (C. 7, 16, 4), but the judgment in favour of the defendant did not prevent a new claimant bringing an action (D. 40, 12, 42); for of course, although the first claimant was not his master, another might be.

4. Prescription. If the person enjoying liberty knows that he is a slave (*dolo malo in possessione libertatis est*), there is no limit to the time during which he may be claimed by his owner. But if he has for twenty years been free, without knowing that he was a slave (*bona fide in possessione libertatis*), his liberty cannot be challenged (C. 7, 22, 2.)

5. Until the suit is decided, the defendant retains his liberty, if he enjoyed liberty when the suit was begun. (C. 7, 16, 4.) This was the principle violated by Appius Claudius when he ordered the daughter of Virginius to be given, for intermediate custody, to one of his own minions.

6. Punishment for a malicious questioning of one's liberty. A claimant that has mischievously and without reason attacked the freedom of any one, is liable to an action for damages, *actio injuriarum*. (C. 7, 16, 31.) He might also be punished with exile. (D. 40, 12, 39, 1.)

7. The burden of proof. The presumption of the Roman Law was not in favour of liberty nor against it, but in favour of the state in which the alleged slave was at the time the action was brought. In order, therefore, to determine upon whom the burden of proof lay, it was sometimes necessary to institute a previous inquiry into the condition of the slave before the suit began. If the alleged slave had been free, but at the time of the suit had been seized by violence, and kept by the alleged master as a slave, the slave was regarded as free, and the master must prove that he was owner. If, on the other hand, the slave escaped and hid himself for some years, and, when the master found him, denied his status; upon proof of those facts the slave would be required to prove that he was free. (D. 40, 12, 7, 5; D. 40, 12, 10.)

C. REMEDIES IN RESPECT OF THE DIVESTITIVE FACTS.

I. *Liberalis Causa*. This is the same action as the former, but the position of the parties is reversed; the master of the slave is now the defendant.

1. Prior to Justinian, this action must be brought by the claimant for freedom, *adsertor libertatis*; but Justinian gave the action directly to the person claiming freedom. It might also be brought by the father of the alleged slave, even against the wishes of the latter. (D. 40, 12, 1.) Children could bring the suit in behalf of parents, also irrespective of their wishes, on the ground that it was a disgrace to the children for their parents to be in slavery. (D. 40, 12, 1, 1.) Cognates (D. 40, 12, 1, 2) and illegitimate children (D. 40, 12, 3) enjoyed the same privilege. The defendant was the person who set up any interest in the claimant as a slave.

2. If the person claiming freedom is living with the defendant as his slave, the action must be brought in the place where the master lives. (C. 3, 22, 4.)

3. The suit for freedom might be brought oftener than once (C. 7, 17, 1), but not unless some new ground had arisen in support of the claim. (D. 40, 12, 25.)

4. There is no prescription against freedom (C. 7, 22, 3); and, therefore, however long a person had been in slavery, he was not precluded from asserting his freedom. Another rule tended to favour liberty. After a person had been dead five years, it was not permitted to challenge his status, with a view to degrade him, but it was allowed to show that his status was higher. Thus if he died a slave, it could be sworn after five years that he was really freeborn; but if he died free, it was not allowed after that time to prove him to be a slave. This rule was introduced by Nerva. (D. 40, 15, 4; D. 40, 15, 1, 4; D. 40, 15, 3.)

II. Special remedies for bequests of liberty on trust—*Fideicommissa*.

The person who was bound by will or codicils to manumit a slave, might refuse to do so, or might evade summons to a court of law, and thereby delay or defeat the benevolence of the deceased. This inconvenience was removed by the following enactments:—1. The *Senatus Consultum Rubrianum* (temp. Trajan) gave the Praetor power to declare a slave free, if the person who ought to manumit him was summoned and refused to appear. (D. 40, 5, 26, 7; C. 7, 4, 5.)

2. The *Senatus Consultum Dasumianum* (temp. Trajan, or not later than Antoninus Pius) gave the same remedy when the person was summoned, but had a good excuse for non-attendance. (D. 46, 5, 51, 4.)

3. The *Senatus Consultum Vitrasianum* (temp. Hadrian or Antoninus rather than Vespasian) extended the remedy to the case where the delay was caused not by the person required to manumit the slave, but by a co-heir. (D. 40, 5, 30, 6.)

4. The *Senatus Consultum Juncianum* enabled the Praetor to decree liberty where the slaves ordered to be manumitted did not belong to the testator. (D. 40, 5, 28, 4.)

Finally, Marcus Aurelius states that no act or default of the person whose duty it is to manumit the slaves shall prejudice their claim to freedom. (D. 40, 5, 13, 16.)

The *INTERDICT de libero homine exhibendo*. This interdict is enforced only when there is no question as to the status of the freeman whom it is sought to liberate from illegal detention. The word to produce (*exhibere*) signifies to bring the person asked into court, so that he may be seen and touched. (D. 43, 29, 3, 12.) The order was to produce the free person whom you detain, knowing that you have no right to do so. *Quem liberum dolo malo retines, exhibeas*. (D. 43, 29, 1.) This order is peremptory, and must be at once obeyed. (D. 43, 39, 42.) If the defendant is condemned, but rather than produce the person whom he wrongfully detains, pays the sum named as damages, the plaintiff or any one else can at once bring a new interdict, carrying a repetition of the damages, and this may be repeated until the person is actually produced.

A P P E N D I X.

In this work no place is assigned to the rights of citizenship as a distinct topic in Roman Law. The proper place for that subject would be a chapter preliminary to the general body of the work. But such a chapter has not been inserted, partly from reasons of convenience, and partly because, in the time of Justinian, questions regarding citizenship had practically ceased to exist. After Caracalla, every subject of the Roman Emperor was a Roman citizen. In the time of Gaius, however, the rules

for determining questions of that kind were still of importance, and the following passages may be considered as illustrations of the general rule stated above (p. 23), governing the determination of *status*.

Therefore if a woman that is a Roman citizen is, while pregnant, interdicted from fire and water, and so becomes an alien before childbirth, many draw a distinction, and think that if it was in lawful marriage that she conceived, then her offspring is a Roman citizen; but if not, then an alien. (G. 1, 90.)

Interdiction from fire and water was the old republican form of banishment. The object was to compel the citizen to withdraw himself, and to avoid the danger of drawing down on the city the anger of some deity, in consequence of driving a worshipper from his altars.

Again, if a woman that is a Roman citizen and pregnant is made a slave under the *Senatus Consultum Claudianum*, for having intercourse with a slave belonging to another despite the master's warnings, then in this case many draw a distinction, and hold that her offspring, if conceived in lawful marriage, is a Roman citizen; but if not, a slave, and the property of the master that now holds the mother as a slave. And again, if an alien conceives not in lawful marriage, and thereafter becomes a Roman citizen before childbirth, then her child is a Roman citizen. But if the father is an alien to whom she is united according to alien statutes and usage, it seems from the *Senatus Consultum* passed at the instance of the late Emperor Hadrian that the offspring is an alien, unless the father too has gained the Roman citizenship. (G. 1, 91, 92.)

The rule just stated, that if a female Roman citizen marries an alien the offspring is alien, is one that holds good even when there is no *conubium* between the parties. This was already accomplished by the *lex Mensia* [of uncertain date], which provides also that if a male Roman citizen marries an alien woman with whom he has no *conubium*, the offspring of their intercourse is an alien. In the former case the statute was needed, for otherwise, since there was no *conubium* between the parents, the child would, by the rule of the *Jus Gentium*, follow the mother's condition, not the father's. But the part that ordains that a child whose father is a Roman citizen and its mother an alien, is itself an alien, brings in nothing new; for even without that statute this would be so by the rule of the *Jus Gentium*. (G. 1, 78, as restored.)

Nay, even the offspring of a Latin woman and a Roman citizen follows its mother's condition; for to this case the *lex Mensia* does not refer. True, indeed, it embraces not only aliens, but also so-called Latins. But the Latins it refers to are Latins in another sense—Latins forming distinct peoples and communities, who were in fact aliens. (G. 1, 79.)

And on the same principle conversely the offspring of a Latin father and a female Roman citizen is a Roman citizen. Some, however, thought that if the marriage were contracted under the *lex Ælia Sentia* the offspring would be a Latin. Because seemingly in that case the *lex Ælia Sentia* and the *lex Junia [Norbana]* gave *conubium* between the parties; and the effect of *conubium* always is that the offspring follows the father's condition. If, however, the marriage were otherwise contracted, then they thought the

offspring would by the *Jus Gentium* follow the condition of the mother. In our day this matters nothing. For the rule in use is declared by the *Senatus Consultum* passed at the instance of the late Emperor Hadrian, that in any case the son of a Latin father and a female Roman citizen is a Roman citizen. (G. i. 80.)

And in agreement with this, a *Senatus Consultum* of the same reign declares that the offspring of a Latin father and an alien mother, as also, on the other hand, of an alien father and a Latin mother, is to follow the condition of the mother. (G. i, 81.)

• Statutory Exceptions.

We ought to observe, however, whether there are any cases in which the rule of the *Jus Gentium* is changed either by a statute, or by a decree having the force of a statute. (G. i, 83.) For instance:—Under the *Senatus Consultum Claudianum* a female Roman citizen that has intercourse with the slave of another with the master's consent, can herself by covenant remain free while her issue is a slave. For the agreement between her and the master of the slave is by that *Senatus Consultum* made valid. But afterwards the late Emperor Hadrian was moved, by the injustice of the case and the anomalous nature of the law, to bring back the rule of the *Jus Gentium*; and thus, since the woman remains free, her offspring too is free. (G. i, 84.)

And again, by the *lex Latina*, the offspring of a female slave and a freeman might be free. For that statute provides that if a man has intercourse with another's slave in the belief that she is free, then the offspring, if males, are free; but if females, belong to the woman's master. But in this case too the late Emperor Vespasian was moved by the anomalous nature of the law to bring back the rule of the *Jus Gentium*. And thus in all cases the offspring, even if males, are slaves of the mother's owner. But that part of the same statute remains untouched which provides that the offspring of a free woman by another's slave, whom she knew to be a slave, are slaves. Therefore among those that have no such statute, the offspring, by the *Jus Gentium*, follow the mother's condition, and are therefore free. (G. i, 85, 86.)

II.—PATRIA POTESTAS.

DEFINITION.

The *Patria Potestas* is the name for the rights enjoyed by the head of a Roman family over his legitimate children. (D. 50, 16, 215.)

The *potestas* could be enjoyed only by Roman citizens (*Romani cives*), and thus the loss of citizenship involved the loss of the *potestas*. Slaves who, on being manumitted, became Roman citizens, and were married, acquired the *potestas* over their children born after the manumission.

We have *potestas* over our children by a regular marriage begotten. The *jus potestatis* that we have over our children is peculiar to Roman citizens. For no other people have such power over their children as we have. This was pointed out by the late Emperor Hadrian in an edict he put forth regarding those that asked from him Roman citizenship for themselves and their children. Nor am I unmindful that the people called Galatae believe that children are in the *potestas* of their parents. (J. 1, 9, pr. 2; G. 1, 55.)

The statement of Gaius that such a power as the *patria potestas* was unknown except among the Romans and Galatians, correctly represents the belief of the Roman jurists, but does not correctly represent the fact. A similar power is found among many other nations of antiquity. Maine's *Ancient Law*, 135. "The heir, as long as he is a child, differeth nothing from a servant though he be lord of all." Galatians iv. 1.

The powers enjoyed by a father over his children were identical with those that a master possessed over his slave. But this statement is subject to a very important qualification. Within the domain of private law, a son was scarcely to be distinguished from a slave; but in the sphere of public rights and duties the son was free and independent. The state had the first claim on its citizens, and where its demands intervened, the paternal despotism was excluded. (D. 1, 6, 9.) Thus a son could be elected magistrate, although he could not marry without his father's consent; and he could act as *tutor* even against his father's wishes, because the office of *tutor* was a public duty. (D. 36, 1, 13, 5; D. 36, 1, 14, pr.) In the same way a son could act as *judex* or judicial referee even to his own father. (D. 5, 1, 77; D. 5, 1, 78.) Again, a son elected Consul could himself superintend the ceremony of his own emancipation from the *potestas*. (D. 1, 7, 3.)

Within the sphere of private law, however, the position of a son is strictly to be compared with that of a slave. To what extent the comparison is in favour of the son, will appear by a consideration of the essential characteristics of the *potestas*.

1. During the Republic, a son was as incapable of possessing property as a slave. All his labour, all that he acquired, became the property of his father. The steps by which this rigorous incapacity was modified, will be enumerated in their place under the law of Property. (See *Peculium*.) It may, however, be here mentioned that the Roman father seems to the last to have enjoyed the right of selling the labour of those under his *potestas*. (Paul, Sent. 5, 1, 1.)

2. The supreme power of life and death is specially mentioned in the laws of the XII Tables as belonging to the *paterfamilias*. We may regard this power as an aspect of the general right of property,—the right, as it is expressed, of doing what one likes with one's own; and such was, to some extent at least, the aspect in which it presented itself in the earlier periods of legal history. But another view mingled with this debased conception of paternal authority—the view, namely, that the despotic authority of the *paterfamilias* bore the character of patriarchal jurisdiction rather than ownership. Seneca calls the *paterfamilias* a domestic judge (*judex domesticus*), (Controvers. 2, 3), and domestic magistrate (*magistratus domesticus*) (De Benef. 3, 2). Be that as it may, the right to kill his offspring undoubtedly belonged to the Roman father during the Republic.

The power of life and death included all minor inflictions of pain. The *paterfamilias* could imprison a refractory son for days or months or years, according to his sole arbitrary pleasure, even although the son had enjoyed the highest honours of the state. The *paterfamilias* could flog his children with any degree of severity, and could bind them in chains and send them to work like convicts in the fields. (Dion. Hal., *Antiq. Rom.* 2, 27.)

To these harsh rights there was, according to Dionysius Halicarnassus (*Antiq. Rom.* 2, 51), a humane and interesting exception. Romulus, he says, made a law to the effect that his subjects should not expose any male children, or their firstborn female child, unless such children were, in the opinion of five neighbours, so deformed that they ought to be killed. An offender against this law was subject, in addition to other penalties, to the forfeiture of half his property to the state. Heineccius refers to this passage without comprehending its significance. It has been pointed out to me by Mr John M'Lennan (the author of that ingenious and admirable work on the earlier stages of social development, *Primitive Marriage*) as “a fine example of good old savage law.” Infanticide is an almost universal practice among savages, and receives its first customary check by the rule that forbids the destruction of the males and eldest female. The reason why only the eldest female enjoyed the benefit of the exception, is to be sought in the small value of women to a savage community. As a rule, savages prefer to steal their wives instead of rearing them.

This law, then, ascribed to Romulus, is an indication, and not the only one, that the customary law of the Romans, as embodied and fixed in the laws of the XII Tables, was not really the beginning of Roman Law. It gives us a glimpse of an earlier and forgotten stage of development, leading back to a far-off state of savagery. According to Cicero (*De Leg.* 38) this law of Romulus was transferred to the XII Tables; but in spite of that, it remained as a tradition among a people that had forgotten its origin and meaning, and we are assured by various writers that the practice of infanticide was common even down to the Empire.

The exercise of the extreme power of killing is not unknown to the readers of Roman history, and it was not until the time of Constantine that an exercise of the ancient right slaying was declared to be murder. Before his time, however, the cruelty of *patresfamilias* had been rebuked and restrained.

In the time of Trajan, a father having been guilty of gross cruelty to his son was compelled by that Emperor to emancipate him, and was deprived of all share in his inheritance. (D. 37, 12, 5.) A similar case occurred under Hadrian. A father, while hunting, killed his son, and was punished by deportation to an island. He was stigmatised as exercising the right of a robber rather than the right of a father, and yet he had received what must be considered severe provocation, the son having committed adultery with his step-mother. (D. 48, 9, 5.) In the year A.D. 228 the Emperor Alexander treats the right of life and death as obsolete, and states that if the father wished to impose more severe punishment on a child than simple flogging, he must apply to the highest judicial authority, the President of the Province, for his sanction. (D. 48, 8, 2.) Finally, in A.D. 318, Constantine enacted that if a *paterfamilias* slew his son, he should suffer the death of a parricide; *i.e.*, be tied up in a sack with a cock, a viper, and an ape, and be thrown into the sea or a river to be drowned. (C. 9, 17, 1.) In A.D. 374 an enactment of Valentinian, Valens, and Gratian made the exposure of infant children a crime, thus imposing upon parents an obligation to rear their offspring. (C. 8, 52, 2.)

3. The right of selling their children belonged to the father who had the *potestas*. "Over his lawful children let him have the power of life and death and of sale. If the father thrice

sells the son, let the son be free from the father.”¹ The child who was sold did not, however, become a slave. (C. 8, 47, 10; Paul, Sent. 5, 1, 1.) From the circumstance that the law of the XII Tables contemplates the possibility of a father selling his child three successive times, it seems reasonable to infer that the transaction resembled a pledge or mortgage rather than a sale, and that after a time the child reverted to his *paterfamilias*. Upon this point see *Mancipium*.

Tradition ascribed to Numa Pompilius a restriction on the power of sale, to the effect that if a *paterfamilias* sanctioned the marriage of his son, he could not afterwards sell him. (Dion. Halicar. *Antiq. Rom.* 2, 28.) By the XII Tables a repetition of the sale of a son for the third time operated as a forfeiture of the *potestas*. By what steps we know not, but almost at the earliest period of legal writing, the power of sale was obsolete, and made use of only in fictitious legal proceedings. Diocletian and Maximian state as clear law, that a sale, gift, or pledge of a son by his *paterfamilias* was wholly void; and even although the purchaser honestly believed that the child was a slave, still he took nothing by the purchase. (C. 4, 43, 1.) Paul (Sent. 5, 1, 1) tells us that if a creditor knowingly accepted a free person as a security for a debt, he was liable to deportation. Afterwards Constantine permitted parents suffering from extreme poverty to dispose of their new-born children (*sanguinolenti*), and the purchaser was entitled to the benefit of their services; but he reserved the right to the father or any other person to redeem the child by payment of money, or giving a slave in exchange. (C. 4, 43, 2.)

These details illustrate the gradual progress of a rational conception of the position of parent and child. At first, the father is despot or owner; he has all the essential rights of ownership, the right to use the son's services, the right to part with them, the right to destroy; but gradually those rights are limited; the father ceases to be the proprietor, he becomes the natural protector and guardian of his children. Such was the tendency of Roman Law, although, as appears from the latest law, it never went so far in the direction of giving independence to the child, as is now considered necessary in all civilised nations.

¹ The words of the XII Tables are, “*Endo liberis justis jus vitæ necis venundandique potestas ei esto. Si pater filium ter venundit filius a patre liber esto.*”

4. It followed that no action for damages could lie at the suit either of son or father against the other.

But if a son does a wrong (*nox*a) to his father, or a slave to his master, no action arises. For between me and a person in my *potestas* no obligation arises. And therefore if he passes into another's *potestas*, or becomes his own master, neither against him nor against the man in whose *potestas* he now is can there be any action. And hence this question is raised:—If another's slave or son wrongs me, and thereafter comes under my *potestas*, does the action fall through, or is it only in abeyance? The teachers of our school think that it falls through, because under the new circumstances the action cannot be sustained; and consequently, although he passes out of my *potestas* I can bring no action. The authorities of the opposing school think that as long as he is in my *potestas* the action is in abeyance, since I can bring no action against myself, but that when he passes out of my *potestas*, then the action revives. (G. 4, 78.)

It was the existence of the *potestas* that determined the legal constitution of a Roman family, so artificial as it seems to us, as indeed it did to the juriconsults of the Empire. The Roman family cannot be defined as consisting of parents with their children; it was composed of those persons who were subject to the *potestas* of the same individual, whether they were his children, grandchildren, great-grandchildren, or entirely unconnected with him in blood. Hence a child who had been emancipated from the *potestas* was at first, from a legal point of view, no member of the family, while a stranger introduced by adoption was regarded to all intents and purposes as the offspring of the head of the family. So far was this view carried that the conception of blood relationship was submerged in that of persons living under the same *potestas*. A sister who was married into another family, and placed under a different *potestas*, was looked on as no longer related to her brothers for any legal purpose. The history of Roman Law discloses a series of changes by which the Roman family was brought nearer and nearer to the modern point of view.

Next comes another division of the law of persons. For some persons are *sui juris*, others *alieni juris*. And again, of those *alieni juris*, some are in the *potestas* of parents, others in the *potestas* of masters. Let us look then to those that are *alieni juris*; for if we know who they are, we shall at the same time understand what persons are *sui juris*. And first, let us treat of those that are in the *potestas* of masters. (J. 1, 8, pr.)

Sui juris. A person not subject to any of the three forms of authority already described, or to be described, *potestas*, *manus*, *mancipium*, was said to be *sui juris*. The phrase *sui juris* does not signify that a person had arrived at any age of legal majority. A child just born, if not under the *potestas* of the father, was *sui juris*.

Alieni juris. A person under any one's *potestas*, *manus*, or *mancipium*, was said to be *alieni juris*.

Paterfamilias. This word is sometimes employed in a wide sense as equivalent to *sui juris*. A person *sui juris* is called *paterfamilias*, even when under the age of puberty. (D. 1, 6, 4.) In the narrower and more common use, a *paterfamilias* is any one invested with *potestas* over any person. It is thus as applicable to a grandfather as to a father. (D. 50, 16, 201.) In this sense the word *paterfamilias* is used throughout this chapter.

Filiusfamilias (son), *filiafamilias* (daughter). These are the co-relative terms to *paterfamilias*, and signify any person, male or female, who is under the *patria potestas* of another. A grandson may therefore be properly designated *filiusfamilias*, and his grandfather, under whose power he is, his *paterfamilias*. (D. 50, 16, 201.)

Materfamilias. At first, probably, *materfamilias* signified a wife under the *manus* of her husband, and was thus the equivalent of *filiafamilias* rather than of *paterfamilias*. A married woman not under the *manus* of her husband was distinguished as *matrona*. (Aul. Gell. 18, 6.) At a later period, *materfamilias* was sometimes employed as equivalent to *paterfamilias* in one of its meanings, and designated any female *sui juris*. (D. 1, 6, 4.) *Materfamilias* was also applied to any respectable woman, whether married or single, freeborn or a freedwoman. Character, says Ulpian, not birth or marriage, marks the *materfamilias*. (D. 50, 16, 46, 1; D. 43, 30, 3, 6; D. 43, 5, 10, pr.)

RIGHTS AND DUTIES.

A. Rights of *paterfamilias*.

I. To exclusive possession of those under his *potestas*.

Sometimes, too, freemen are the objects of theft (*furtum*), as when a child in our *potestas* [a wife in our *manus*, or even a debtor assigned to me by a court, or a hired gladiator] is carried off by stealth. (J. 4, 1, 9; G. 3, 199.)

II. To exclusive use. It has been already pointed out (p. 2) that a father could bring an action for damages for injuries suffered by his son through the negligence of a defendant.

III. An *injuria* to a child in the power of his father is an injury to the father.

A man may suffer an *injuria*, not only in his own person, but also in those of his children *in potestate*, and of his wife [although not held *in manu*]; for this opinion has on the whole prevailed. And therefore, if you wrong my daughter, Titius' wife, an *actio injuriarum* lies against you, not only in my daughter's name, but also in the name of me the father, and of Titius the husband. But, on the other hand, if an *injuria* is done to a husband, the wife cannot bring an *actio injuriarum*. For wives ought to be defended by husbands, not husbands by wives. An *actio injuriarum* may also be brought by a father-in-law on behalf of his daughter-in-law, if her husband is in his *potestas*. (J. 4, 4, 2; G. 3, 221.)

The rights of children begin where the rights of slaves end. The utmost limit of legal security accorded to the slave was to give the master, not the slave, an action for serious harm done to the slave. But a child in his father's power

could suffer an *injuria* altogether apart from any disrespect intended for his father, although the latter alone could bring an action for the appropriate penalty. Whether, at some earlier period, the son was in the same position as the slave, is a matter of conjecture; but when the written records of law appear, the son is treated altogether as a freeman, although with an incapacity to enforce his rights. His father alone had the power of compelling the wrongdoer to pay compensation. But every injury to the son was regarded also as an injury to his father, and therefore two actions might be brought: one for the injury to the father, the other for the injury to the son. The damages in each action were fixed in accordance with the dignity of the persons: if the son had the higher dignity, the heaviest damages would be obtained on his account. (D. 47, 10, 30, 1; D. 47, 10, 31.)

The rights of wives are complete, and they can also bring the necessary actions to vindicate their rights, unless they are in the *manus* of their husbands; for the *manus* over wives was the equivalent of the *potestas* over children. If a woman had not passed under the *manus* of her husband, which in later times she seldom did, she continued under the *potestas* of her father; and hence, for a wrong done to her, both her husband and her father had each an action. (D. 47, 10, 18, 2.) The husband had an interest in the modesty of the wife, the father in the good name of the daughter. (C. 9, 35, 2.)

It might, indeed, happen—so distinct were the grounds of injury—that no wrong might be done to the son, and yet through him a wrong be done to his father. The son might give his consent, and therefore no wrong would be done to him; but still the son's consent did not wipe out the wrong to the father. Thus—if A sold B's son with his consent, no wrong was done to the son; but nevertheless B had his action against A for the wrong done to him as father. (D. 47, 10, 1, 5; D. 47, 10, 26.)

Under certain circumstances, however, a son, while still in his father's power, could himself bring an action for injury done to him. This was allowed under three conditions:—the father must be absent, or insane; he must have gone away without leaving any agent (*procurator*) authorised to bring the action; and the Praetor must have given his permission, after ascertaining whether the son was likely to conduct the case properly. (D. 47, 10, 17, 17; D. 47, 10, 17, 11.) "The Praetor says, If to him that is in another's *potestas* an injury is alleged to have

been done, and he that has the *potestas* is not within the jurisdiction, and no agent appears to act in his name, then, after ascertaining the facts of the case, to him that is alleged to have received the injury I will give a remedy."¹

The son could not bring the action if the father were within the jurisdiction, and refused; for the reason why the son was allowed to bring the action at all, was the assumption that the father, if present, would sue. Occasionally, when the father was at home, but of low character, and the son was respectable, the latter was permitted to sue in his own name. (D. 47, 10, 17, 12.) When the son sued he proceeded in his own name, not in the name of his father; and after he had brought his action, his father could not afterwards sue on his own account. (D. 47, 10, 17, 21.) Also, after the father's death, if the son were relieved from the *potestas*, he could sue for any *injuria* done to him. (D. 47, 10, 17, 22.)

B. Duties of the *Paterfamilias*.

I. At first a *paterfamilias* was responsible for his sons exactly in the same way as a master for his slaves, and could get rid of all liability by surrendering the wrongdoer.

A curious question of form is discussed by Gaius.

When a son is given up to be held *in mancipio* because of some wrong he has done (*noxali causa*), the authorities of the opposing school think that he ought to be thrice conveyed by mancipation; and this because of the statutory provision in the XII Tables, that no son shall pass out of his father's power unless by three mancipationes. But Sabinus and Cassius, and the rest of the authorities of our school, think that one mancipation is enough; for they believe that the provision in the XII Tables refers only to voluntary mancipation. (G. 4, 79.)

A son surrendered *in mancipio* was not a slave. He was bound to work for his new master, but was not apparently in other respects in the status of slavery. (*Servire actori debet non fit tamen servilis conditionis*. Quintil., Inst. Orat. 7.) Also, by payment of the sum due as damages, the son could at any time be released. (Collat. Leg. Mos. et Rom., 2, 3.)

II. Disuse of noxal surrender.

In old times, indeed, such surrenders were made even in the case of children, both sons and daughters. But later ways of thought have rightly judged that such harshness is abominable; and it has therefore fallen into

¹ *At Praetor. Si ei qui in alterius potestate erit, injuria facta esse dicatur neque is cujus in potestate est, praesens erit, neque procurator quisquam existat qui eo nomine agat: causa cognita ipsi qui injuriam accepisse dicatur judicium dabo.* (D. 47, 10, 10, 17.)

entire disuse. For who could bear to surrender to another, for some misdeed (*nox*) his son, and above all his daughter? Would not the father, through his son's person, risk more than the son himself? While in the case of daughters a due regard to modesty forbids the practice. And therefore it is decided that slaves alone are liable to *noxales actiones*; while we find it often said in the older commentators that *fili familias* can be sued in person for their delicts. (J. 4, 8, 7.)

INVESTITIVE FACTS.

A. Acquisition of the *potestas* over a man's own issue.

I. We have *potestas* over our children by a regular marriage begotten. (J. 1, 9, pr.; G. 1, 55.)

The offspring of you and your wife is in your *potestas*. And so, too, the offspring of your son and his wife. Your grandson (that is) and granddaughter, are equally in your *potestas*, and your great-grandson and great-granddaughter, and so on. Your daughter's offspring, however, is not in your *potestas*, but in its father's. (J. 1, 9, 3.)

In order to contract regular marriages, and to have the children therein begotten under their *potestas*, Roman citizens must marry wives that are Roman citizens, or, at all events, Latins or aliens with whom they have *conubium*. For the effect of *conubium* is to make the children follow the father's condition, and thus the sons become Roman citizens, and are in the father's *potestas*. (G. 1, 56.)

All that we have said of the son must be understood of the daughter also. (G. 1, 72.)

It is at this point—as an investitive fact in regard to the *potestas*—that Gaius and Justinian treat of the conditions necessary to a legal marriage. The subject will be examined fully in treating of the relation of husband and wife. (Book II. Divis. II.)

It sometimes happens that children not in their parents' *potestas* at birth, are yet afterwards brought under *potestas*. (G. 1, 65.)

II. A Latin freedman that has a child a year old may, by petition, obtain a grant of the *potestas* over his child (*anniculi probatio*).

Therefore if a Latin, in accordance with the *lex Ælia Sentia*, marries a wife and begets a son, whether that son is a Latin by a Latin wife, or a Roman citizen by a wife that is a Roman citizen, the father will have no *potestas* over him. But afterwards, by showing good grounds, he gains Roman citizenship, and his son as well. And from that instant the father's *potestas* over the son begins. (G. 1, 66.)

It is different with those that by the *jus Latii* obtain the Roman citizenship not only for themselves but for their children. For their children pass under their *potestas*. And this right is enjoyed by some alien states, if only they have the *Majus Latium*. For *Latium* is either *majus* or *minus*. It is

called *majus* when by holding a magistracy or post of honour in their own state men win the Roman citizenship, not only for themselves, but for their parents and children and wives. It is called *minus* when those only that actually hold the magistracy or post of honour attain to the Roman citizenship. And this distinction is set forth in many letters of the Emperors. (G. I, 95, as restored.)

Jus Latii. In tracing the development of Roman Law, we are at every point confronted with the fact, that it was a system confined exclusively to Roman citizens. Citizens alone had civil rights or duties; citizens alone could sue or be sued. But, by treaty with their neighbours, the Romans admitted aliens born to a share, greater or less, of their civic rights. A distinction commonly made was between the privilege of intermarriage (*conubium*), which was the basis of the domestic or family law, and the privilege of holding property and making contracts (*commercium*), which was the basis of commercial intercourse. It was upon this distinction that the privileges accorded to the inhabitants of *Latium* were determined. To them was granted *commercium*, but not *conubium*; with special facilities, however, for enabling them to acquire the full status of Roman citizens. By the *lex Julia et Plautia de civitate* (B.C. 87) the rights of citizens were extended to the whole of *Latium*, and henceforth the expression *jus Latii* ceased to have any territorial signification, and was conferred upon remote districts, as on Sicily by Julius Cæsar, and on the whole of Spain by Vespasian.

The exact position of a *Latinus* may be determined by the information given us regarding *Latini Juniani*, who were manumitted slaves not allowed any greater rights than the old *Latini*. (See Book III. Div. II., *Latini Juniani*.)

As far as regards making good a case of mistake, the age of the son or daughter matters nothing; for on that point the *Senatus Consultum* makes no provision, unless indeed the case put forward is that of a Latin man or woman married under the *lex Ælia Sentia*. For no doubt then, if the son or daughter is less than a year old, the case cannot be made good. Nor am I unmindful that in a rescript of the late Emperor Hadrian it seems to be settled that to make good any case of mistake the son must be a year old. But we ought not always to regard a letter by the Emperor to a particular person as bringing in a general rule of law. (G. I, 73, as restored.)

III. When a marriage is illegal in consequence of a mistake as to the status of one of the parties, upon proof of the error the *potestas* in certain cases could be obtained.

In those cases in which the mother's not the father's condition is followed by the offspring, it is abundantly plain that the father, even if a Roman citizen, can have no *potestas* over it. And therefore we specially mentioned above that in certain cases where, through some mistake, the marriage was not duly contracted, the Senate steps in to remedy the defect in the marriage; and in that way often the son is brought under the father's *potestas*. But if a female slave conceives by a Roman citizen, and thereafter by manumission becomes herself a Roman citizen before child-birth, although the offspring is a Roman citizen like his father, yet he is not in his father's *potestas*. For the intercourse in which he was conceived was not regular (*justus*); nor is there any *Senatus Consultum* to make it quasi-regular. (G. I, 87, 88.)

1. The husband is a citizen; the wife is, at the time of marriage, supposed also to be a citizen, but is really a Latin (*Latina*), or alien (*peregrina*), or one of the *dedititii*. (For *dedititii*, see Book II. Div. II.)

And again, if a Roman citizen marries a Latin or an alien wife through ignorance, believing her to be a Roman citizen, and begets a son, that son is not in his *potestas*. For indeed he is not even a Roman citizen, but either a Latin or an alien—that is, of his mother's condition. For no one follows his father's condition, unless between his father and his mother there is *conubium*. But a *Senatus Consultum* allows him to make good a case of mistake; and then both the wife and the son come to be Roman citizens, and thenceforward the son is in his father's *potestas*. And the rule of law is the same if through ignorance he marries a wife that is one of the *dedititii*; except that the wife does not become a Roman citizen. (G. I, 67.)

2. Converse case. The wife is a citizen, but the husband is a Latin, an alien, or one of the *dedititii*.

And again, if a female Roman citizen by mistake marries an alien, taking him for a Roman citizen, she is allowed to make good a case of mistake: and so her son too and her husband come to be Roman citizens, and the son of course instantly passes under the father's *potestas*. The rule of law is the same if it is an alien she marries, taking him for a Latin coming under the *lex Ælia Sentia*; for this case is specially provided for by a *Senatus Consultum*. And so up to a certain point if she marries a *dedititius*, taking him for a Roman citizen or a Latin coming under the *lex Ælia Sentia*, except indeed that the *dedititius* remains in his own condition, and therefore the son, although he becomes a Roman citizen, is not brought under his father's *potestas*. (G. I, 68.)

3. Again, if a Latin woman marries an alien believing him to be a Latin coming under the *lex Ælia Sentia*, under a *Senatus Consultum* she can after the birth of a son make good a case of mistake. And so all become Roman citizens, and the son passes at once under his father's *potestas*. (G. I, 69.)

4. The same precisely is the rule of law if a Latin in mistake marries an alien woman believing her to be a Latin or a Roman citizen coming under the *lex Ælia Sentia*. (G. I, 70.)

5. And further, if a Roman citizen, in the belief that he is a Latin, marries a Latin woman, he is allowed, after the birth of a son, to make good a case of mistake, just as if he had married a wife under the *lex Ælia Sentia*. Those too that, although Roman citizens, believing themselves to be aliens marry aliens, after the birth of a son are allowed by a *Senatus Consultum* to make good a case of mistake. And when this is done the alien wife becomes a Roman citizen, and the son, who also is an alien, not only comes to be a Roman citizen, but also is brought under his father's *potestas*. (G. I, 71.)

6. Nay, an alien, too, that has married by mistake, is allowed to make good his case, as is pointed out by a rescript. For a case actually occurred in which an alien married a female Roman citizen, she believing him to be a Latin coming under the *lex Ælia Sentia*, and after the birth of a son obtained on other conditions the Roman citizenship. Then when the question was raised, whether he could make good a case of mistake, the Emperor Antoninus

decided by a rescript that he could, just as if he had remained an alien. And hence we gather that even an alien can make good a case of mistake. (G. 1, 74, restored.)

From what we have said it is clear—(1.) That if an alien marries a female Roman citizen, whether in mistake or whether she knows his condition, the offspring of that marriage is by birth an alien. (2.) That if, however, it was by mistake that the marriage with him was contracted, this case can be made good under the *Senatus Consultum*, according to what we have said above. (3.) That if, on the other hand, there was no mistake from first to last, but the female Roman citizen knew the condition of her husband, in no case is the status of the husband or son changed. (G. 1, 75, restored.)

It is necessary to add that a grant of citizenship did not necessarily carry with it the *potestas* over children born before the grant. It has been observed that when a Latin freedman had a son not less than a year old, he acquired at the same time the rights of a citizen and of a *paterfamilias*. With regard to aliens, Gaius says:—

If an alien receive a grant of Roman citizenship for himself and his children, he has no *potestas* over the children unless they are expressly subjected to his *potestas* by the Emperor. And this is done only when the Emperor, after inquiring into the case, judges this best for the sons. And if they are under puberty or abroad, the inquiry is very searching and minute. All this is pointed out in an edict of the late Emperor Hadrian. Again, if a man whose wife is pregnant receives a grant of Roman citizenship both for himself and for her, although the offspring is, as we have said above, a Roman citizen, yet it is not in the *potestas* of the father. This is pointed out in a document under the hand of the late Emperor Hadrian. And therefore, if a man knows that his wife is pregnant at the time he is asking the citizenship for himself and his wife from the Emperor, he ought to ask the Emperor at the same time to allow him the *potestas* over the child that is to be born. (G. 1, 93, 94.)

IV. LEGITIMATION (*Legitimatio*). It sometimes happens that children at the moment of their birth are not in the *potestas* of their parents, but are afterwards brought under the *potestas*. For instance, a natural son afterwards presented to the Curia is subjected to the father's *potestas*. A son, moreover, begotten by a free woman, whom the father might have married, so far as the laws were concerned, but with whom he only cohabited, is afterwards brought under the father's *potestas*, if under a constitution of ours instruments of dowry are drawn up; and even to others, if they are begotten by the same marriage, our constitution makes a like concession. (J. 1, 10, 13.)

If the children were old enough to be able to object to the legitimation, their opposition was fatal. They would be brought under the *potestas* without their consent, but not against their will. Modestinus "*inviti filii naturales, vel emancipati, non rediguntur in patriam potestatem.*" (D. 1, 6, 11.) Celsus "*vel consentiendo vel non contradicendo.*" (D. 1, 7, 5.)

1. Legitimation by subsequent marriage (*legitimatio per subsequens matrimonium*).

Legitimation was the process by which children born to Roman citizens, not in a regular marriage, and therefore not under the *potestas* of their father, were brought under his *potestas*. Legitimation was confined to a single class of children (*naturales liberi*), the offspring of concubinage. (For *Concubinatus*, see Book II. Div. II., Husband and Wife, Appendix.) Concubinage was a species of left-handed marriage, the difference between which and marriage was, in law, inconsiderable. When persons exchanged the lower for the more respectable union, the act was allowed a retroactive effect, and the children born before the marriage were subjected to the *potestas*.

Legitimation by subsequent marriage was first introduced by Constantine (A.D. 335), who enacted that if free-born concubines were married by the men with whom they cohabited, their children born before the marriage should be under the husband's *potestas* (*sui ac legitimi*). Zeno abrogated the law of Constantine (A.D. 476), reserving the rights of those free-born concubines who in A.D. 476 had children. (C. 5, 27, 5.) Legitimation, after having existed for 141 years, was thus abolished, and the law continued in this state for 53 years, until Justinian (A.D. 529) revived and amplified the enactment of Constantine. Justinian pointed out that it was rather hard that the children born of a concubine after marriage should be legitimate to the exclusion of those born before, since it was the affection entertained for the offspring of the concubinage that induced the parents to marry. Putting together the laws made at different times by Justinian, the following may be stated as the conditions of legitimation by marriage:—The marriage must be attested either by writing or by the settlement of a dowry (*dos*); it must have been preceded by concubinage as opposed to promiscuity, and during the concubinage there must have been no legal impediment to the marriage of the parties. (C. 5, 27, 10.) This last condition was necessary to prevent an evasion of the law, for otherwise persons that were prohibited from marrying could have lived in concubinage, and, when the impediment was removed, legitimated their children by marriage. The woman might be a manumitted slave (*libertina*), (Nov. 89, 8), or even a slave, if the property of the man, the marriage operating as a manumission. (Nov. 78, 3.) It was immaterial whether the father had or had not previously to the concubinage any legitimate children. (Nov. 89, 8; Nov. 12, 4.)

2. Legitimation by making a natural child a Decurio.—*Legiti-*

matio per oblationem curiæ. This is the first mode referred to in the text of Justinian.

The Curia was to the provincial municipalities much what the Senate was to Rome. (C. 10, 31, 36.) The dignity of the Curia was hereditary (C. 10, 31, 44), and the only way of increasing its members was by co-optation. At one time the burdens of a member of the Curia so outweighed the privileges that election to it was considered a punishment. (C. Th. 12, 1, 66; C. 10, 31, 38.) The Decurions were compelled to live in their cities (D. 50, 2, 1); they could not be soldiers or clergymen (C. 1, 3, 12); and they were forbidden to sell their lands without the concurrence of a judge as to the necessity of the sale. (C. 10, 33, 1.) As a bribe to induce men to add members to the Curia, legitimacy was given to their natural children.

The first step was taken in A.D. 442. Theodosius and Valentinian enacted that those who offered their natural children to the Curia, or who gave a daughter in marriage to a *decurio*, should be permitted to give them during life or on their death the whole of their property. (C. 5, 27, 3.) This narrow privilege was extended by Leo and Anthemius A.D. 470, who gave to those children the right of succession to their father if he died without making a will. Justinian (Nov. 89, 2, 1) empowered any one during his life or by his testament to make his natural son a *decurio*, and legitimate. But this legitimation was not thoroughgoing; it made the legitimated child for all purposes a legitimate child of its father, but gave it no claims on any of his relatives. Its operation was therefore more restricted than the first kind of legitimation. (Nov. 89, 4.)

3. Legitimation by Rescript of the Emperor (*per rescriptum principis*) was introduced by Justinian (Nov. 89, 9) after the analogy of the *Restitutio Natalium* (see Book II. Div. I., Freedmen.) That Novel authorised the Emperor to grant on the petition of a father a rescript of legitimation, conferring on him the *potestas* over any of his natural children when he had no legitimate children, and when their mother was dead or undeserving of marriage.

4. By testament confirmed by the Emperor. In the case just stated, if the father during his life neglected to apply for a rescript, but intimated in his will his desire that his children should become legitimate, they were authorised to apply for, and obtain, the rescript of legitimation. (Nov. 89, 10.)

5. ADOPTION.—Anastasius permitted fathers to adopt their natural children, and thereby obtain the *potestas* over them; but Justin took away the privilege; and his decision was followed by Justinian, who observed that it was a cruel injustice to allow a father, by resorting to adoption, to supersede his legitimate children. (Nov. 74, 3; Nov. 89, 7.)

B. The acquisition of the *potestas* over another's children.

Not only the children born to us (*naturales*) are, as we have said, in our *potestas*, but those too that we adopt. (J. 1, 11 pr. : G. 1, 97.)

Effect of Adoption.

Adoptive children, as long as they are held in adoption, are in the position of children born to us. But if emancipated by their adoptive father, then neither by the civil law nor as far as regards the Praetor's edict are they numbered among his children. (G. 2, 136.) And the same principle (applied conversely) governs their relations to the parent to whom they were born. For as long as they are in the adoptive family they are held to be outsiders. But if emancipated by their adoptive father, then forthwith their case is the same as it would have been if they had been emancipated by their father to whom they were born. (G. 2, 137.)

A Roman family, from the legal standpoint, must be defined as consisting of a Head or Ruler, and of the persons subject to his absolute power. The children of the Head of the family were not legally related to him unless they were in his power; while, on the other hand, persons unconnected with him in blood were children for all legal purposes, if they had been brought under his power by the artificial tie of adoption. The family, as a legal unit, was based on the despotic authority of its head. There was doubtless a time, further back than the earliest records of Roman Law, when the legal was also the moral basis of the family; when the only tie between man and man was subjection to a common superior. The nearer we get to the fountain-head of our civilisation, the narrower in its scope appears to be the feeling of moral obligation. At first no duty is recognised outside the circle of one's family or clan; in a higher stage, the city is the limit of social obligation; to be a stranger (*hostis*) is to be an enemy; and even the most enlightened spirits of antiquity rose little above the prejudices of their time. Thus Plato, while proposing, as a humane modification of the rights of the conqueror, that Greek should not enslave Greek, did not venture to extend the indulgence to barbarians, that is, to all outside Hellas. In the more backward and primitive state of

society, the one condition of safety was to be a member of an organised group. The family was such a group, and it has accordingly been suggested that the device of adoption was first introduced as a means of enabling outsiders to enter into a family, to share its sacred rites and enjoy its protection.

But a consideration of the facts concerning adoption in the Roman Law points to the explanation of that form of fictitious relationship in a different direction. It would rather appear from the indications presented to us in the records of law, that the primary object of adoption was to obtain an heir to a childless family, and that fictitious relationship was resorted to only as a substitute in the absence of descendants. In the most ancient form of adoption, the object appears clearly to have been to avoid the extinction of a family by the death of its head without heirs. Thus unmarried men could not adopt, nor even married men, unless they had no hope of children of their own. (D. 1, 7, 15, 2.) Adoption may be ranked as an earlier invention than the Will, both having originally the same or a similar object in view—to determine the devolution of an inheritance in the absence of the natural heirs.

The oldest form of adoption was called *arrogatio*, and only persons *sui juris* could be arrogated. The later form has no other name than adoption (*adoptio*); it is the transfer of a person from the *potestas* of one man to that of another, and therefore belongs to the class of transvestitive facts.

There is this peculiarity in adoption [by the people's authority (*per populum*)] by the Emperor's divine wisdom (*per sacrum oraculum*), that if a man has children in his *potestas* when he offers himself to be adopted by *arrogatio*, not only is he himself subjected to the *potestas* of the *arrogator*, but his children too pass under the *potestas* of the *arrogator* and stand in the place of grandsons. For this reason the Emperor Augustus adopted Tiberius only after Tiberius adopted Germanicus, in order that as soon as the adoption took place Germanicus should become Augustus' grandson. (J. 1, 11, 11; G. 1, 107.)

I. The form of arrogation.

1. The ancient form.

Adoption takes place in two ways; by the people's authority (*populi auctoritate*) and by the power (*imperium*) of the magistrate—the Praetor, for instance. (G. 1, 98.)

By the people's authority we adopt persons *sui juris*. This kind of adoption is called *arrogatio*; because, *first*, the man adopting is asked (*rogatur*), that is, questioned, whether he wishes the man he is going to adopt to be his legally recognised (*justus*) son; and *then* the man adopted is asked whether

he will suffer that to be done ; and *lastly*, the people are asked whether they order it to be done. (G. 1, 99.)

The arrogation took place in the *comitia curiata* in the ordinary form of legislation.¹ To the person about to be arrogated the formulae employed were—Do you formally agree that Publius Fonteius shall have over you, as over a son, the power of life and death? To the people—Is it your will, your order, Quirites, that Lucius Valerius should be to Lucius Titius by right and statute a son, as if by birth the child of Titius and his *materfamilias*, and that Titius should have over him the power of life and death? This, as I have stated it, is the motion I now put to you, Quirites.

The sanction of the Pontiff (*Pontifex*) was*also required; he was the guardian of the sacred rites (*sacra privata*), and was bound to guard against the extinction of any such rites by the arrogation of the only representative of a family.² This mode of arrogation was in active existence during the Republic, and was resorted to by the early emperors, as by Augustus in the adoption of Agrippa and Tiberius. No other form is mentioned by Ulpian or Gaius, although the *curiae* were represented in their time probably only by thirty lictors.

2. At some period unknown, the fiction of popular legislation was dropped, and arrogation was effected directly by rescript of the Emperor.

Adoption takes place in two ways ; either by imperial rescript, or by the power of the magistrate. By the Emperor's authority we adopt men or women that are *sui juris*. This kind of adoption is called *arrogatio*. (J. 1, 11, 1.)

II. Restraints on arrogation.

1. Adoption by the people's authority takes place nowhere but at Rome. But the other form is allowed in the provinces too, before the governors. (G. 1, 100.)

¹ *Auctorne esses, ut in te P. Fonteius vitae necisque potestatem haberet, uti in filio.* Cic. *pro Domo* 29.

"*Velitis jubeatis, Quirites, uti L. Valerius L. Titio tam jure legeque filius sibi siet, quam si ex eo patre, matreque familias ejus, natus esset; utique ei vitae necisque in eo potestas siet; haec ita, uti dixi, ita vos, Quirites, rogo.*"—Aul. Gell. *Noct. Att.* v. 19.

² A similar connection between adoption and religion may be remarked in the Hindoo Law. The laws of Menu expressly state that adoption is allowed only to the childless, and to prevent a failure of the funeral ceremonies. These ceremonies, according to the belief of the Hindoos, are necessary for the comfort and repose of the deceased. Now, in the Hindoo law, the heir is the person whose duty it is to perform the funeral sacrifices, and thus adoption comes to be a mode of appointing an heir. We find also in Athens that the primary object of adoption was to ensure that some one should make the proper sacrifices and offer the funeral cake.

2. The arrogator must be married (*Cic. pro Domo*, 13, 15), and upwards of sixty years of age, unless his health is bad, or some other reason renders it probable that he may die childless. (D. 1, 7, 15, 2.) In adoption, as opposed to arrogation, there was no such restraint; unmarried persons could adopt others who were *alieni juris*. (D. 1, 7, 30.)

3. Arrogation was regarded as a substitute for progeny, and accordingly a man could not arrogate more than one person, or any even, if he had legitimate children. (D. 1, 7, 17, 3; D. 1, 7, 15, 3.)

4. Women could not be present in the *Comitia*, and thus could not be arrogated; but when arrogation was allowed by rescript they could. (Ulp. Frag. 8, 5; D. 1, 7, 21.)

Again, adoption by the people's authority is not in use for women, according to the better opinion. But women [*i.e.*, *alieni juris*] are usually adopted before the Praetor, or in the provinces before the Proconsul or the *Legatus*. (G. 1, 101.)

5. A tutor or curator could not arrogate any one that had been under their guardianship, otherwise a dangerous door to malversation would have been left open. (D. 1, 7, 17.)

6. Although a person below or above the age of puberty could be adopted, no one under that age could be arrogated. (Ulp. Frag. 8, 5.)

Again, adoption of a boy under puberty by the people's authority has sometimes been forbidden, sometimes allowed. Now, in accordance with a letter by the most excellent Emperor Antoninus to the *pontifices*, if there seems to be a legally recognised ground of adoption, under certain conditions it is allowed. But before the Praetor, and in the provinces before the Proconsul or *Legatus*, we can adopt a person (*i.e.*, *alieni juris*) of any age. (G. 1, 102.)

When a boy under puberty is adopted by arrogation, the imperial rescript of authorisation is not granted until the nature of the case has been ascertained. Strict inquiry is made as to the object of the arrogation, whether it is honourable and for the good of the pupil. And even then it takes place under certain conditions. (1.) The arrogator must give security to a public officer (*persona publica*), a notary namely, that if the pupil dies under puberty he will restore his goods to those that, if no adoption had taken place, would have been his heirs. (2.) Again, the *arrogator* cannot emancipate them unless, on the nature of the case being ascertained, they prove worthy of emancipation; and then he must restore them their goods. (3.) And further, if the (adoptive) father on his deathbed disinherits the son, or in his lifetime emancipates him without grounds the law will recognise, he must by law leave him a fourth part of his goods, over and above the goods that are brought to him by his adopted son, either directly when adopted, or in enjoyment at a later time. (J. 1, 11, 3.)

The *persona publica* here spoken of was at first a slave, and,

according to the rules of law, the benefit of a promise made to a public slave was given to any one of the public in whose behalf it was made. The age of puberty was fixed at fourteen for boys and twelve for girls.

Ulpian tells us that the inquiries mentioned in the text (*causa cognita*) were directed to the motive of the arrogator—whether the person arrogated was a relative or the object of a genuine affection; to the respective fortunes of the parties—whether the person arrogated was likely to gain by the transaction, and to the general character of the arrogator. (D. 1, 7, 17, 2.) The poverty of the arrogator was not a complete barrier, if he were inspired by honourable and undoubted feelings of kindness. If security were not given, an action for damages lay against the arrogator. (D. 1, 7, 19.)

TRANSVESTITIVE FACT. (*Adoptio*.)

I. Adoption as a transvestitive fact.

1. Before Justinian.

A man is allowed to adopt some one as his grandson or granddaughter, or great-grandson or great-granddaughter, and so on, although he has not a son. And another's son he may adopt as his grandson, or another's grandson as his son. But if he adopts some one as a grandson, to be son, as it were, to his own adoptive son, or to a son by birth in his *potestas*, in that case the son too must consent, and not have a *suus heres* brought in to him against his will. But, on the contrary, if a grandfather gives his grandson by his son to be adopted, the son's consent is not needed. In very many respects, too, the son adopted simply or by arrogation is put on the same footing as a son born in a regular marriage. And therefore, if a man adopts some one by the imperial authority, or before the Praetor or provincial governor, and that some one is not an outsider, he may give him to another to be adopted. (J. 1, 11, 5-8.)

Effect of adoption on children *en ventre sa mere*.

You must know, too, that if your daughter-in-law conceives by your son, and you afterwards emancipate the son or give him to be adopted during your daughter-in-law's pregnancy, none the less her offspring is born in your *potestas*. But if conception took place after emancipation or adoption, it is to the emancipated father or adoptive grandfather's *potestas* that the offspring is subjected. (J. 1, 12, 9.)

The grandson conceived by a son once or twice conveyed by mancipation, although born after the third conveyance of his father, is yet in his grandfather's *potestas*. It is by the grandfather, therefore, that he must be emancipated or given to be adopted. But a grandson conceived by a son now *in mancipio* by a third conveyance is not born in his grandfather's *potestas*. Labeo, indeed, thinks that he is *in mancipio* of the person to whom his father belongs. But the rule of law in use is this: that as long as

his father is *in mancipio* his rights are suspended ; if his father is manumitted after conveyance, the grandson falls under his *potestas* ; but if he dies still *in mancipio*, the grandson becomes *sui juris*. (G. I, 135.) And as regards a child conceived by a grandson, although but once conveyed by mancipation, the rule is the same as for a son conveyed for a third time. For, as we said above, what three conveyances effect in the case of a son, is effected by one in the case of a grandson. (G. I, 135 a.)

2. Justinian introduced a profound alteration, doing away, in effect, with the peculiar characteristics of adoption. The purpose of adoption was to enable a man to exercise the *potestas* over one that was not his child.

But now under our constitution, when a father by birth gives a *filius-familias* to an outsider to be adopted, the rights of *potestas* enjoyed by the father by birth are far from being lost. Nothing passes to the adoptive father, nor is the son in his *potestas*, although in case of intestacy we have bestowed on him the rights of succession. But if the father by birth gives the son to be adopted not to an outsider but to his son's grandfather on the mother's side, or (if the father by birth has himself been emancipated) even to the grandfather on the father's side, or to the great-grandfather in like manner on either side,—in this case, because the rights both by birth and by adoption meet in one person, the right of the adoptive father remains unshaken. For the bond is due to the ties of birth, and is drawn the closer by a lawful mode of adoption. And therefore in such a case the son comes both into the household and into the *potestas* of the adoptive father. (J. I, 11, 2.)

Justinian legislates, in this constitution, in a manner that plays havoc with the old juridical character of adoption, but was not unsuited to the circumstances of his day. Adoption had lost its primitive character ; there were no sacred family rites to maintain ; there was, in short, no reason for adoption, except merely the desire of childless persons to attach others to them by the ties of interest and affection. Like other antiquated institutions, it produced cases of occasional great hardship. A youth is given, let us suppose, by his father in adoption ; the person adopting him soon afterwards emancipates him. The result was that the youth was out of both families, and was postponed in the succession to his father's inheritance to more distant relatives. To remedy this evil was the purpose of Justinian's constitution, as summarised in the text.

Such being Justinian's object, it naturally followed that he would make a difference in the case of arrogation. A person arrogated being, as has been said, under no one's *potestas*, in no one's family, can lose nothing by giving himself in arrogation. Therefore it was enacted (C. 8, 48, 10, 5) that the old

law should remain in force in the case of arrogation; and consequently the arrogated person fell under the *potestas*, and became a member of the family of the person that arrogated him. The enactment, with the same purpose, exempts from the change those cases where a father or other ancestor adopted a child or other descendant. Such cases were necessarily rare, but they might occur.

Illustrations.

A has a daughter B, whose son C is under the *potestas* of his father. The father gives C in adoption to A. A, being an ancestor, will acquire the *potestas*.

A has a son B whom he emancipates. After emancipation B has a daughter C, born under his *potestas*. B gives C in adoption to A. A thus acquires the *potestas* over C.

A has a son B, and B's son C, both under his *potestas*. A emancipates B, but not C. A afterwards gives C in adoption to B. B acquires the *potestas* over C.

II. The form of adoption of those *alieni juris*.

1. The ancient fictitious sale. This was a fictitious suit founded on the law of the XII Tables, which imposed a forfeiture of the *potestas* on the father who, with barbarous cruelty, should subject a son three times to a sale.

And further, parents, when they have given their children to be adopted, cease to have them in their *potestas*. A son given to be adopted is thrice conveyed by mancipation, with two manumissions between; just as is usually done when a father lets a son go from his *potestas*, and so makes him *sui juris*. Next, he is either reconveyed to the father, and from him before the Praetor claimed by *vindicatio* as a son by the adoptive father, and in the absence of any contrary claim is made over by the Praetor to him as his son; or he is not reconveyed to the father, but by an *in jure cessio* is given up to the claimant (*vindicanti*) by the person holding him under his third conveyance by mancipation. But undoubtedly it is more convenient to have the reconveyance to the father. As regards other descendants, male or female, one conveyance is enough; and they are either reconveyed to the ascendant or not. The same formalities are observed in the provinces before the governors. (G. 1, 134.)

The form of transfer by mancipation is given by Gaius. (G. 1, 119.) (See *Mancipium*.)

Adoption by sale thrice repeated involved two different stages, which ought to be kept separate. A has a son B, whom he proposes to give in adoption to C. B is in A's *potestas*, and it is desired to take him out of A's *potestas* and place him in B's *potestas*. This is a twofold operation.

(1.) How is B to be taken out of A's *potestas*? It is at this stage of the transfer that the law of the XII Tables has been forced into use. A mancipates B to C, and C manumits B by the *vindicta*, as in the manumission of a slave. The effect of this manumission is that B relapses into the *potestas* of A. Again A mancipates B to C, and again C manumits B, thus restoring him to the *potestas* of A. For the

third and last time A mancipates B to C, and by this third sale forfeits the *potestas*. B is now held by C as his property (*in mancipio*), as a kind of chattel; but it is desired not to make him a chattel, but a son of C. Then—

(2.) How is B to be converted from a chattel (*mancipium*) to a son? In other words, how is B, who is no longer under the *potestas* of A, to be brought under the *potestas* of C? Gaius in the text points out two ways in which this might be done. (1^o) The first consists of the following steps:—After the third sale, C mancipates B back again to A, who now retains B, not as his son, but as property (*in mancipio*). C now appeals to the Praetor, and by the proper suit (*vindicatio*) claims B as his son. A makes no opposition, and therefore the Praetor adjudges B to C as his son. C now holds B under his *potestas* by a judgment of a court of law. This is the procedure recommended by Gaius in the text.

(2^o) The other mode is somewhat different, and will most easily be understood by giving the steps from the very beginning:—

- (a) A mancipates B to C or D, and C or D manumits B.
- (b) A again mancipates B to C or D, and C or D manumits B.
- (c) A mancipates B to D.
- (d) C sues (*vindicat*) D, and claims B as his son.
- (e) D makes no objection.
- (f) The Praetor thereupon adjudges B to C as his son.

This form might be resorted to before any municipal magistrate that had jurisdiction over the ancient forms of procedure—*Legis actiones*. (Paul, Sent. 2, 25, 4.)

2. Adoption by simple declaration before a magistrate.

By the magistrate's authority we adopt those in the *potestas* of their ascendants, whether of the first degree—children, namely, as a son or daughter; or of a lower degree, as grandson, granddaughter, great-grandson, great granddaughter. (J. 1, 11, 1; G. 1, 99.)

In the time of Diocletian, it appears (C. 8, 48, 4) that adoption could not be effected by written instruments, but only by the solemn form in the presence of the Praetor. Justinian abolished the sales and manumissions, substituting a mere declaration, recorded in writing. (C. 8, 48, 11, A.D. 530.)

But if a father gives a son that he has *in potestate* to his father or grandfather by birth to be adopted, in accordance with our constitutions on this subject—that is, if this is declared with due formalities before a qualified judge in the presence of both adopted and adopter without opposition from either,—then the *jus potestatis* is at an end as regards the father by birth. But it passes over in such a case as this to the adoptive father; for in his person adoption, as we have already said, is most full. (J. 1, 12, 8.)

An informal adoption could be confirmed on petition to the Emperor (D. 1, 7, 38), but only after hearing any objectors who might offer themselves. (D. 1, 7, 39.)

III. Restraints on adoption (also on arrogation).

1. The question that has been raised, whether a younger man can adopt an older, is common to both forms of adoption. (G. 1, 106.) A younger man, it is settled, cannot adopt an older. For adoption copies nature; and it is a gross violation of nature that a son should be older than his

father. He therefore that is taking to himself a son, whether by arrogation or by adoption, ought to be by the full period of puberty—by eighteen years, that is—his senior. (J. 1, 11, 4)

So in adopting a person as a grandchild, there must be a disparity of not less than 36 years.

2. Women, too, cannot adopt; for not even their children by birth are in their *potestas*. But by the Emperor's goodness they are allowed to adopt, to comfort them for children they have lost. (J. 1, 11, 10; G. 1, 104.)

This permission was granted by Diocletian and Maximian, A.D. 291. The woman did not acquire the *potestas*, but only such rights as she would have had if the person adopted had been her legitimate child. (C. 8, 48, 5.)

3. It is common to both forms of adoption that even those that cannot beget (as *spadones*) can adopt, but those that have been made eunuchs cannot. (J. 1, 11, 9; G. 1, 103.)

4. Adoption could not be repeated. One that has adopted a person, or given him in adoption, or emancipated him, cannot afterwards adopt him. (D. 1, 7, 37, 1.)

But a son adopted either by authority of the people or before the Praetor or a Provincial Governor, may be given over to some one else to be adopted. (G. 1, 105.)

ADOPTION BY TESTAMENT never existed. Julius Cæsar did indeed name C. Octavius as his son, but the direction had no validity except as an injunction to the people to sanction the act. It required to be consummated by a *lex curiata*. Another case is mentioned in the Digest. (D. 37, 14, 12.) Seius died, leaving a will, in which he named his freedman Julius his son, and named him heir along with his other children. The nomination was void.

c. Forfeiture of independence for ingratitude.

A son or daughter who had been emancipated from the *potestas* was not absolved from all ties, and, as in the case of slavery, might forfeit their independence. This forfeiture was the penalty for grossly insulting the *paterfamilias* who had emancipated them, or doing him some grave injury. (C. 8, 50, 1 C. Th. 8, 14, 1.)

DIVESTITIVE FACTS.

A. Voluntary divestitive facts by the act of the parties [*Emancipatio*].

Emancipation was a voluntary act on both sides; the *paterfamilias* could not (ordinarily) be compelled to emancipate his

filiusfamilias, and the *filiusfamilias* could not be emancipated against his will. (D. 1, 7, 31; C. 8, 49, 4; Nov. 89, 11.)

Children, whether by birth or by adoption, have almost no way of forcing a parent to let them go free from his *potestas*. (J. 1, 12, 10.)

An exception was made when a person under the age of puberty had been arrogated; on reaching that age he was allowed to prove that the arrogation was injurious to his interests, and the arrogating *paterfamilias* was obliged to emancipate him. (D. 1, 7, 32; D. 1, 7, 33.)

We ought to note further that a man's discretion in choosing whom he will free from his *potestas* is altogether unrestrained. If, for instance, he has a son and a grandson or granddaughter by him in his *potestas*, he may let the son go free from the *potestas*, but keep the grandson or granddaughter. Conversely he may keep the son in his *potestas*, but manumit the grandson or granddaughter; and of course this must be understood of a great-grandson also, or a great-granddaughter. Or finally, he may make all *sui juris*. (J. 1, 12, 7; G. 1, 133.)

I. The form of emancipation.

1. The most ancient form, based on the triple sale.

By emancipation, too, children cease to be in the *potestas* of their parents. A son must be thrice conveyed by mancipation before he goes out from the parental *potestas*; all other children, whether male or female, once only. For the law of the XII Tables refers to the person of a son alone, when it speaks of three conveyances, in these words:—"If a father sells a son thrice, let the son be free from the father." It is done thus:—The father conveys the son by *mancipatio* to a third person; that third person manumits the son by *vindicta*, and thereupon the son returns into his father's *potestas*. The father a second time conveys the son either to the same third person or to some one else (usually to the same); he again in like manner manumits the son by *vindicta*, and thereupon the son once more returns into his father's *potestas*. Then a third time the father conveys him either to the same third person or to some one else (but usually to the same); and by that third conveyance the son ceases to be in the father's *potestas*, even although he is not yet manumitted, but is still *in causa mancipii*. (G. 1, 132.)

So far the account in the text exactly agrees with the first part of the ancient form of adoption, and there the text ends. The rest may be supplied from Gaii Epit. 1, 6, § 3, 4. The person to whom the son is mancipated is called fiduciary father (*paterfiduciarius*), because of the duty he has to perform. If the fiduciary father were to manumit the son, whom he holds *in mancipio*, he would become in law the patron of the son, and acquire a patron's rights of succession to the emancipated son's property. The ancient law was strict and formal; it looked only to the persons that figured in its ceremonial

observances. Thus it was the individual manumitting a slave or son that became the patron, even although he had no interest in the slave or son, but acted in the fictitious proceedings the part of a mere lay figure. Such a result it was usually an object to avoid. A father emancipating a son would naturally wish to retain the rights of a patron, and not to cut himself off from the inheritance of his son. This object was accomplished very simply. After the third sale, the fiduciary father mancipated the son to the natural father, who thereupon, holding his son *in mancipio*, himself performed the ceremony of manumission by the *vindicta*, and became his son's patron.

At some period the Praetor intervened to prevent the fiduciary father from fraudulently acquiring the rights of patronage by manumitting the son, and made the natural father in every instance the patron. (J. 1, 12, 6.)

The steps in a formal emancipation were as follows :—A desires to emancipate his son B. C is the *paterfiduciarius*, the fictitious purchaser. (1.) A mancipates B to C, and C manumits B by the *vindicta*. (2.) A again emancipates B to C, and C manumits B as before. (3.) A again mancipates B to C. (4.) C now mancipates B to A. (5.) A manumits B, and acquires the rights of patronage.

2. THE ANASTASIAN RESCRIPT, A.D. 503.—The old formal emancipation necessarily required the presence of the parties to go through the fictitious sale. Anastasius made provision whereby a *paterfamilias* away from home might emancipate his children. He did not abolish the old forms, but introduced this novelty as an additional means of releasing children from the *potestas*. A petition must be sent to the Emperor, and his favourable answer obtained. The answer must be registered, produced in a court having jurisdiction over emancipation, and deposited along with the petition to the Emperor; and if the persons emancipated were not infants, their consent must be given. The act was perfected by the formal consent of the Emperor. (C. 8, 49, 5.)

3. Change by Justinian.

Formerly emancipation was effected either according to the old usage of law (by imaginary sales, that is, with manumissions between), or by imperial rescript. But our forethought has by a constitution made a change in this for the better. And now the fiction of early times is done away with; parents go direct before a qualified judge or magistrate, and let their sons or daughters, or grandsons or granddaughters, and so on, go free from their power [*manus*.] And then, under the Praetor's edict, over the goods of such a son or daughter, grandson or granddaughter, manumitted by the parent,

precisely the same rights are guaranteed to the parent as are given to a *patronus* over the goods of his freedman. And further, if the child, son, daughter, or whatever it may be, is still under puberty, the parent by the manumission becomes its tutor. (J. 1, 12, 6.)

B. Divestitive facts by operation of law.

Under this head are grouped the various facts that dissolved the *potestas*, irrespective of the wishes of the *paterfamilias*. These facts are either not acts of the *paterfamilias* or *filiusfamilias*, or acts not done with a view to dissolve the *potestas*.

I. The death of a person subject to any *potestas* is a divestitive fact with reference to that person; but the death of the *paterfamilias* does not always release a *filiusfamilias* from the *potestas*.

Let us see now how persons *alieni juris* are freed from those rights over them. As for slaves, how they are freed from *potestas* may be understood from what we have said above in regard to their manumission. Those again in an ascendant's *potestas*, on his death become *sui juris*. But here a distinction is taken. For on the death of a father, undoubtedly in any case his sons or daughters become *sui juris*. But on the death of a grandfather it cannot be said that in any case his grandsons and granddaughters become *sui juris*, but only if after the death of the grandfather they are not to fall under the *potestas* of their father. Therefore, if on the death of the grandfather, their father is both alive and in the *potestas* of his father, then after the decease of the grandfather they come to be in the *potestas* of their father. If, however, their father, at the time the grandfather dies, is either already dead or out of his father's *potestas*, then the grandchildren, because they cannot fall under their father's *potestas*, become *sui juris*. (J. 1, 12, pr.; G. 1, 125-127.)

II. Any change of a capital status (*capitis deminutio*) suffered by a *filiusfamilias* takes away the *potestas* of his *paterfamilias*; and the same result is produced by any change of a capital status of the *paterfamilias*. (D. 4, 5, 1.)

A slave on manumission suffers no *minutio capitis*, because he had no *caput*. (J. 1, 16, 4.)

Where the change is one of dignity rather than of status, there is no *minutio capitis*. And therefore it is agreed that when a man is removed from the Senate he undergoes no *minutio capitis*. (J. 1, 16, 5.)

As *caput* includes the three principal heads of status,—liberty, citizenship, and family rights,—it may suffer a reduction according as one or more of these elements are taken away. The withdrawal of liberty necessarily involves the loss both of citizenship and of family rights. This is, in fact, the entire destruc-

tion of *caput*, and is called the greatest reduction of status (*maxima deminutio capitis*). The loss of the second element, citizenship, carries with it the loss of family rights, but not of liberty. It is called the intermediate reduction of status, *media deminutio capitis*. The third element, family rights, may be changed or modified without affecting the two others. This is called the least reduction of status (*minima deminutio capitis*).

Capitis deminutio is a change from one's former status. It is found in three forms, *maxima*, *minor* (which some call *media*), and *minima*. (J. I, 16, pr. ; G. I, 1, 59.)

The changes of status that operated as divestitive facts of the *potestas* may be arranged under those three heads.

1. The loss of liberty—*Maxima deminutio capitis*. This list includes the investitive facts of slavery. (See Slavery, Inv. Facts.)

Maxima capitis deminutio occurs when a man loses at once his citizenship and his freedom. This happens in the case of those that are made *servi poenae* by a harsh sentence; freedmen, for instance, condemned for ingratitude toward their patrons, or freemen that have suffered themselves to be sold in order to share the price. (J. I, 16, 1.) A man made *poenae servus* ceases to have his sons in his *potestas*. They are made *servi poenae* that are condemned to the mines or exposed to wild beasts. (J. I, 12, 3.) This happens, for instance, in the case of those that quit their fatherland and go abroad, either not giving in their names at the census, or shirking service as soldiers. Those, too, that stay, but suffer themselves to be sold as slaves, become under a *Senatus Consultum* the slaves of those they meant to defraud (and thus undergo *maxima capitis diminutio*). And so do the freeborn women that under the *Senatus Consultum Claudianum* become slaves to those masters whose refusals and warnings they have defied by having intercourse with their slaves. (G. I, 160, as restored.)

EXCEPTION.—If an ascendant is taken by the enemy, although he becomes the enemies' slave, yet his descendants' rights remain in suspense because of the *jus postliminii*. For those taken by the enemy, if they return, regain all their early rights. The ascendant, therefore, if he returns, will have the descendant in his *potestas*; for the fiction of *postliminium* is that the captive has always been in the state. But if he dies there, the son becomes *sui juris* [whether this dates from the death of the ascendant among the enemy, or from the time he was taken, may be doubted]; and this dates from the time his father was taken. And in like manner, if the son himself or grandson is taken by the enemy, we say that, because of the *jus postliminii*, the *jus potestatis*, too, of the ascendant is in suspense. The word *postliminium* comes from *limen* (a threshold), and *post* (afterwards). And the man that is taken by the enemy, and afterwards comes within our bounds, returns, as we rightly say, by *postliminium*. For as the thresholds in houses form a bound to the houses, so the bound of the Empire is looked on by the ancients as a threshold. Hence also comes the word *limes*, a sort of bound and end. And from it comes the

word *postliminium*, because the man returned within the same threshold whence he had been lost. A captive, too, recovered when the enemy is conquered, is held to return by *postliminium*. (J. 1, 12, 5; G. 1, 229.)

Jus postliminii.—The rights of a person who by the hard fortune of war was made a captive remained in suspense. By the fiction of *postliminium*, introduced doubtless by the juriconsults (*naturalis aequitas*, D. 49, 15, 19, pr.), if the captive returned, he was placed, as far as might be, in the same position as if he had never left his native country; but if he died in captivity, this fiction had no place, and he was therefore held to have died a slave.

If only the interests of the captive had been at stake, probably no effort would have been made to modify the law; but the death of a freeborn citizen as a slave had an injurious effect upon his family. If a slave, how could his children inherit from him? (D. 50, 16, 3, 1.) To stretch the fiction of *postliminium* to this case seems to have been too bold a course for the juriconsults, and accordingly the knot was left to be cut by statute. In B.C. 81 the *lex Cornelia* created a fiction analogous to, but extending further than, *postliminium*. It provided that if a captive died in captivity his death should be held to date, not from the actual moment of his decease, but from the time he was captured; so that, although he lived a prisoner, he died free. (D. 49, 15, 18.) This convenient fiction prevented the ill consequences that would have resulted from striking out in a family a link in the chain of hereditary succession.

The fiction of *postliminium* applied when persons or property were taken by an enemy or a foreign power, and afterwards returned or were recovered. It was not essential that there should be a state of war; it was sufficient if a foreign state, bound by no treaty of friendship with Rome, seized the person or property of any Roman citizen. (D. 49, 15, 12.) But capture by robbers or pirates, or by one of two parties in a civil war, did not change the legal position of the persons or property seized: the persons in law continued free, the property in law still belonged to its rightful owners, and consequently no occasion arose for the fiction of *postliminium*. (D. 49, 15, 21, 1.) The necessity for such a fiction arose from the fact that ancient law regarded capture in war as a lawful title to the person as well as the property of the enemy. A Roman taken prisoner was regarded by his own law as a slave, as well as by the law of the state that made him prisoner. Consequently, while in a state of captivity or slavery, he could acquire no rights, and the period of his captivity was a period of civil death. But if the capture were not lawful, the legal capacity of the person remained unimpaired, and he was not debarred from the acquisition of rights, although he was prevented from the exercise of them.

The fiction of *postliminium* applied both to persons and property taken by the enemy, but there is convenience in taking the two cases separately. As applied to free persons made captives and slaves, *postliminium* has by modern writers been called *activum*; applied to slaves or other property taken by an enemy, *passivum*.

1. *Postliminium* in case of free persons taken prisoners and made slaves. Such persons do not get the benefit of the fiction unless their capture has been against their will. (C. 8, 51, 19.)

Illustrations.

Soldiers who surrendered with arms in their hands were held to be made captive by their own will. (D. 49, 15, 17.) So, of course, deserters. (D. 49, 15, 19, 4.)

A treaty of peace has stipulated for the return of all prisoners of war. Whoever remains with the enemy after the return of peace was held to be in voluntary captivity. (D. 49, 15, 20.)

A son under *potestas* deserts to the enemy. Although in regard to his *paterfamilias*

he may be looked on as property (D. 49, 15, 14), still the law preferred to view him simply as a citizen, and therefore his return did not again bring him under the *potestas*. The reason assigned is quaint: that if the father loses him, it is no more than his fatherland has done; and that with the Romans from of old discipline held the first place, parental affection the second. The decision is sound enough without the aid of these somewhat ponderous fictions. (D. 49, 15, 19, 7.)

A person is entitled to the benefit of *postliminium* when he has returned, by whatever means, within the frontier of his own country, or of a friendly power (D. 49, 15, 19, 3), provided he has no intention of returning. (D. 49, 15, 26.) Thus Regulus was sent from Carthage to beg for favourable terms of peace to the Carthaginians. With the full intention of returning, he gave advice to continue hostilities, and returned. His status as a captive was not for a moment affected by his absence from Carthage, since he had the intention of returning. (D. 49, 15, 5, 3.)

The effect of *postliminium* is that the returned captive enjoys all the rights that have accrued to him during the period of his captivity.

A woman is made captive and enslaved. During her captivity her mother dies. On returning from captivity she can claim her mother's property as hers. (C. 8, 51, 14.)

A is taken captive while his wife is with child. She gives birth to a son (B), who grows up, marries, and has a child (C). After the birth of C, A returns. C is under the *potestas* of A. (D. 49, 15, 23.)

A husband and his wife are taken captive. In captivity she gives birth to a child. On their return this child falls under its father's *potestas*, although it was born of captive parents, and therefore a slave. (D. 49, 15, 25.)

A husband is made a prisoner. On his return he finds his wife married to another. He cannot claim his wife, because marriage rested solely upon the consent of both parties; but his wife is liable to the penalties attached to improper repudiation. (D. 49, 15, 8; D. 49, 15, 14, 1.)

2. *Postliminium*, as applied to property, had a somewhat different shade of meaning. The capture of goods or land by an enemy operates as a divestitive fact of the ownership. After capture the former owner has no longer in law any right. If, however, the property is recovered from the enemy, such recovery is made a re-investitive fact to the former owner. When the enemy was expelled from land occupied by them, the land reverted to its former owners, and was not confiscated or given as prize of war. That land only was to be confiscated which was taken from the enemy. (D. 49, 15, 19, 10.) In like manner, slaves were restored to their former owners. (C. 8, 51, 10; D. 49, 15, 19, 5.) Property thus restored was accompanied with all burdens and limitations. Thus, if it was subject to usufruct, the usufruct revives. (D. 7, 4, 26.)

Postliminium was admitted in favour of land, slaves, ships of war or merchant ships—not, however, fishing vessels or pleasure-yachts (D. 49, 15, 2, pr.); and horses (D. 49, 15, 2, 1); but not armour, which could not be lost without disgrace (D. 49, 15, 2, 2), nor clothes. (D. 49, 15, 3.) A prisoner taken from the mines was sent back to his punishment. (D. 49, 15, 12, 17.)

2. Liberty is retained, but citizenship lost. *Media capitis deminutio*.

1°. Latin colonists.

In the old times, when the Roman people were still planting colonies in the Latin districts, a man that by a father's command had gone to join a Latin colony went out in that way from under the *potestas*. For they that thus withdrew from the citizenship of Rome were received as citizens of the new state. (G. 1, 131.)

2°. Banishment unaccompanied with imprisonment. *Aquae et ignis interdictio*.

The *deminutio capitis* is *minor* (lesser) or *media* (intermediate) when citizenship is lost, but freedom retained; as in the case of a man shut out from the use of fire and water, or transported to an island (used as a penal settlement). (J. 1, 16, 2; G. 1, 161.)

Since a man, that for some crime is shut out under a penal law from the use of fire and water, loses thereby his citizenship, it follows that because he is in that way removed from the number of Roman citizens just as if he were dead, his children cease to be in his *potestas*. For reason will not suffer a man in the condition of an alien to have a Roman citizen in his *potestas*. And by parity of reasoning, if a man in his father's *potestas* is shut out from the use of fire and water, he ceases to be in his father's *potestas*. For equally reason will not suffer a man in the condition of an alien to be in a Roman father's *potestas*. (G. 1, 128.)

3°. Deportation. *Deportatio insulae*.

Callistratus included deportation and simple banishment among the punishments that involved the loss of liberty. (D. 50, 13, 5, 3.) But Justinian holds a milder view.

Since a man that for some crime is transported to an island loses his citizenship, it follows that because he is in that way removed from the number of Roman citizens just as if he were dead, his children cease to be in his *potestas*. And by parity of reasoning, if a man in his father's *potestas* is transported to an island, he ceases to be in that *potestas*. But if by the Emperor's goodness they are restored, they regain in every respect their early status. (J. 1, 12, 1.)

Fathers that are banished (*relegati*) to an island, keep their children in their *potestas*. And conversely, children that are banished remain in their parent's *potestas*. (J. 1, 12, 2.)

Deportation to an island was introduced by Augustus to avoid the ill consequences of allowing a crowd of banished men to meet wherever they pleased. It was banishment for life. (D. 48, 22, 18, 1.) The deported prisoner could buy and sell, and enter into all the contracts that were considered to arise from the *Jus Gentium*. (D. 48, 19, 16.)

Relegation or exile (*exilium*) is a prohibition against entering one's province or Rome, or any particular district, either for life or for a limited term. (D. 48, 22, 14.) It may also be restriction to an island or to any particular place (*lata jura*). (D. 48, 22, 7; D. 48, 22, 5.) It involved no forfeiture of property or loss of *status*, and was simply a restriction of locomotion. (D. 48, 22, 4; D. 48, 22, 18.)

4°. Desertion to the enemy. (D. 4, 5, 5, 1.)

3. *Capitis deminutio minima*.

Capitis deminutio is *minima* (least) when both citizenship and freedom are kept, but the man's *status* undergoes a change. For instance, when persons *sui juris* come to be *alieni juris*, or *vice versa*; [in the case of persons adopted, of women that make a *coemptio*, and of persons given by mancipation,

or manumitted therefrom. So far does this go, that every time a man is conveyed by mancipation, or manumitted, he undergoes a *capitis deminutio*.] (J. 1, 16, 3; G. 1, 162.)

Capitis deminutio.—The meaning of this expression, like that of the cognate term *status*, has given rise to much controversial writing. The difficulty in the word *status* is that it is undoubtedly used in various senses, with a narrower or wider extension of meaning, and can hardly be restricted to any precise technical signification. *Caput* is of narrower import, and relates specifically to three things—liberty, citizenship, and position in a family. To these three elements corresponds each of certain possible alterations, and hence there are three degrees in which *caput* may be lessened.

1. The first question to be determined is, whether the phrase, *capitis deminutio*, represented a real, or only a verbal, generalisation; in other words, whether a change of *status* entailed any legal consequences on account of its being a *capitis deminutio*. Thus, arrogation had certain specific legal effects; it subjected a person who was *sui juris* to the *potestas* of another; but had it any consequences, not as arrogation, but as a *capitis deminutio*? Obviously, if this question be answered in the negative, and if the same answer must be given in regard to every other change of *status*, it follows that there is no legal importance whatever to be attached to the phrase *capitis deminutio*. As a phrase, it may once have been elegant and serviceable, although now obscure; but the question whether a particular change of *status* is a *capitis deminutio* would not be of the smallest consequence; and a controversy on the subject would be a mere logomachy. The language of Gaius rather encourages the belief that the Roman jurists did attribute some effect to a *capitis deminutio* (G. 3, 83; G. 4, 38); but in the time of Justinian (J. 3, 10, 1) there was apparently only one case (the *obligatio operarum* of a manumitted slave) where the slightest importance attached to a question of *deminutio capitis*. The legal consequences, if any, of a *capitis deminutio*, were so insignificant as scarcely to call for notice. This helps, therefore, to reduce the importance, if it does not remove the difficulty, of the second question.

2. What was meant by *capitis deminutio*? According to Gaius (D. 4, 5, 1), it was simply a change of *status*. Savigny proposes to amend this definition by adding,—a change for the worse. In a general view, this addition corresponds to the facts. Thus a change from liberty to slavery is undoubtedly a change for the worse; so is it to lose the rights of citizenship. When a *paterfamilias* gave himself in arrogation, the change may be described as a descent in legal capacity; so if a woman *sui juris* fell under the *manus* of her husband. Again, a son under *potestas* given by his father, even if only for form's sake, in *mancipio*, falls into a lower class. We can thus understand how the transvestitive fact of adoption and the divestitive fact of emancipation should equally be considered a *capitis deminutio*, because the process required that the children should remain for a time in *mancipio*. (D. 4, 5, 3, 1.) On the other hand, a son that became *sui juris* by the death of his father, inasmuch as he obtained his independence without passing through the lower stage of *mancipium*, did not suffer a *capitis deminutio*. (D. 14, 6, 3, 4.) In like manner, a vestal virgin or *Flamen Dialis*, who was released from the *potestas* by elevation to office without going through any form of emancipation, was held not to suffer a *capitis deminutio*. So far these examples go to prove that *capitis deminutio* means a descent from a higher to a lower *status*,—from liberty to slavery, from independence to subjection (*potestas* or *manus*), or from a higher to a lower form of subjection (*potestas* or *manus* to *mancipium*). On the other hand, elevation to independence, provided it was not achieved by passing through the state of *mancipium*, was not a *deminutio capitis*. But these cases do not exhaust the possibilities of descent in legal capacity. A woman *sui juris* passing into the *manus* of her husband, undoubtedly changed her legal capacity for the worse; but a woman that passed directly from the *potestas* of her father to the *manus* of her

husband, suffered a change of *status*, but not a descent in *status*. But the texts (G. 1, 162; G. 4, 38) seem to refer equally to both cases as examples of *capitis deminutio*. Savigny endeavours to remove the objection from these passages,—not altogether without success; but he does not get over the absence of a link of evidence that cannot well be spared. The great objection to Savigny's theory is found in a passage from Paul (D. 4, 5, 3, pr.), which states that the children of a person arrogated suffer a *capitis deminutio* by the arrogation of the father, although it makes no change to them, but is merely a transfer from the *potestas* of one person to the *potestas* of another. Savigny admits that this passage is wholly irreconcilable with his views, and argues at great length that Paul made a mistake, and was wrong in holding that case to be an example of *capitis deminutio*. The point would have been of the smallest practical importance, to a Roman lawyer practising in the time of Justinian; and it scarcely seems necessary to force ourselves to a judgment one way or the other.

III. A *paterfamilias* forfeited his *potestas* by gross misconduct.

1. A father that compelled his daughter to prostitute herself, forfeited his *potestas*. (C. 1, 4, 12; C. 11, 40, 6.)

2. Exposure of free children carried with it a forfeiture of the *potestas*. (C. 8, 52, 2; C. 1, 4, 24; Nov. 153, 1.)

3. The legitimate children of a man that contracts an incestuous marriage, are not only released from his *potestas*, but gain all his property, subject to affording him maintenance. (Nov. 12, 2, 2.)

IV. Certain public dignities released persons from the *potestas*.

1. And further, sons go out from the parental power when they are installed as priests of *Jupiter Dialis*; girls when they are taken for vestal virgins. (G. 1, 130.)

2. A *filiusfamilias*, although he has served as a soldier, or become a senator or consul, remains in his father's *potestas*. For service or the dignity of consul does not free a son from a father's *potestas*. But under a constitution of ours, the crowning dignity of the patriciate, the moment the imperial patent is issued, sets a man free from his father's *potestas*. For who could bear that a father might by emancipation release his son from the bonds of his *potestas*, but that the Emperor's highness should not be able to exempt the man whom he has chosen as father from another person's *potestas*? (J. 1, 12, 4.)

The dignity of the patriciate was created by Constantine. These fathers (*patres*) were councillors to the Emperor, but had no jurisdiction of their own. The rank was conferred only on those who had filled the office of Consul, Pretorian Prefect, or Master of Offices (*Magister Officiorum*). (C. 12, 3, 3.)

3. Justinian, however, subsequently extended the liberation from the *potestas* to bishops (Nov. 81, 3), consuls, prefects, masters of soldiers (*magistri militum*), and generally to all the officials that were excused from serving in the *curia* (Nov. 81). This privilege was accompanied with another. These digni-

taries, although released from the *potestas*, were suffered to enjoy all the rights accruing to children living under the *potestas*. They were to enjoy the sweets of liberty together with the consolations of servitude.

REMEDIES.

A. Remedies in respect of the rights of the *paterfamilias*. Under this head nothing has to be added to the observations made in the case of slavery. The *paterfamilias* has the usual remedies against theft, robbery, damage, or injury.

B. Remedies in respect of the investitive and transvestitive facts.

These may be divided into two groups; the object of the first group being to establish the *potestas*; and the object of the second group being subsidiary—to remove doubts, in certain cases, in regard to the fact of paternity.

I. Proceedings to establish the *potestas*.

1. *Vindicatio*.—This was the usual real action by which a title to any property could be made out. It was employed in the fictitious form of adoption, and may, if we may guess from a passage in the Digest (D. 6, 1, 1, 2), have been resorted to occasionally as a mode of recovering a lost *potestas*.

2. Procedure by interdict, *de liberis exhibendis et ducendis*.—This was analogous to the exhibitory interdict by which the production of a freeman in court could be secured. It was open to the defendant to dispute the existence of the *potestas*. (C. 8, 8, 1.) No interdict was granted if the son wished to remain with the person in whose possession he was. (D. 43, 30, 5.) The remedy of the father in such a case is given under the next head.

The interdict could not be brought against a husband to produce his wife to her *paterfamilias* (D. 43, 30, 1, 5); nor against a mother, according to a rescript of the Emperor Antoninus, when it was judged best that the child should remain with her. Her custody of the child did not, however, deprive the husband of his other paternal rights. (D. 43, 30, 1, 3; D. 43, 30, 3, 5.)

The interdict *de liberis ducendis* enabled the *paterfamilias*, when his *filiusfamilias* was produced, to carry him off without resistance. (D. 43, 30, 3, 1.)

3. Extraordinary Procedure—*Cognitio Extraordinaria* or *Notio Prætoris*.

When it was not a third party, but the *filiusfamilias* himself that resisted the claim of his *paterfamilias*, the remedy was by application to the Prætor, who examined whether the alleged *paterfamilias* had any *potestas*; and if so, gave him the *filiusfamilias*. (D. 43, 30, 3, 3.)

II. Proceedings in regard to the fact of Paternity.

The general rule was that the children of a lawful marriage were regarded as the offspring of the husband. This rule seems to have been at one time absolute; but a *Senatus Consultum* was passed in the time of Hadrian, enabling a father to dispute the legitimacy of his wife's child born during the marriage (D. 25, 3, 3, 1). Thus, if he were away from home ten years, and on his return found that his wife had a child a year old, the presumption in favour of his paternity would be destroyed. But where the husband had access to his wife, he was not permitted to dispute the paternity, unless through illness the cohabitation had been interrupted, or his health had been such as to render paternity impossible. (D. 1, 6, 6.) In several cases, special precautions were taken to remove doubts as to paternity.

1. AFTER DIVORCE. *Senatus Consultum Plancianum de agnoscendis liberis*.

The wife affirms the paternity. A woman, pregnant when divorced, ought within thirty consecutive days (D. 25, 3, 1, 9) to notify the fact to her divorced husband or his father (if he is under his father's *potestas*), to give an opportunity of sending five

skilful midwives to examine and watch her (*ventris inspicendi; custodes mittendi*). (Paul, Sent. 2, 24, 5.) Should the husband neglect this opportunity, he cannot afterwards dispute the paternity. (D. 25, 3, 1, 3.) If the woman did not give notice, or refused to admit the midwives, she could not claim a maintenance for the child; but its rights were not in any other respect prejudiced (D. 25, 3, 1, 8; Paul, Sent. 2, 24, 6).

2. AFTER DIVORCE. The husband affirms, and the wife denies, her pregnancy.

This case seems not to have been provided for by the *Senatus Consultum Plancianum*. It is dealt with by a rescript (D. 25, 4, 1), which states that the husband ought to choose respectable women and three skilful and trustworthy midwives to inspect the divorced wife. If the majority think that she is pregnant, she is to be persuaded to admit watchers (*custodes*). If she were recalcitrant, the Praetor could fine her, or apply other modes of compulsion. (D. 25, 4, 1, 3; D. 25, 4, 1, 7.)

3. THE HUSBAND IS DEAD, and his widow asserts that she is pregnant.

She is bound to notify the fact to the persons interested in her husband's estate twice a-month. They may send five women to inspect her, and, at the proper time, watchers. (D. 25, 4, 1, 10.)

III.—MANUS.

DEFINITION.

In the course of Roman history the relation of husband and wife is presented under two aspects. In the first and earliest the position of the wife was nearly identical with the position of a slave, or child under the *potestas*.

Now let us see about the persons in our *manus*—a right peculiar to Roman citizens. (G. I, 108.) *Potestas* applies to both males and females; *manus* to females only. (G. I, 109.)

Manus was the name for the rights that a husband possessed over his wife. It could not be enjoyed by any one except a husband, nor by a husband except in relation to his wife: but no husband had the *manus* in consequence merely of his marriage; he could acquire it only in the ways presently to be described. A wife, if under her husband's *manus*, was called *materfamilias*; if not, simply *uxor* or *matrona* (wife or matron). (Cic. Top. 3.)

The effect of the *manus* is best described in the words of Gaius.

Nay, even if a woman makes a *Coemptio* with her husband *fiduciae causa*, none the less she at once takes the position of a daughter. For if a wife in any case, and for any reason, no matter what, is in her husband's *manus*, it is decided that she obtains the rights of a daughter. (G. I, 115, *ib.*)

From the number of phrases into which the word *manus* enters, it was probably, as has been conjectured, the original name for the powers of the head of a family, whatever the objects—cattle, slaves or children—over which they were exercised. By a

process of differentiation the ownership of slaves and other property came to be designated by "*dominium*," the nearest equivalent of "property." The rights over children were named "*potestas*;" over free persons, not as children, *mancipium*; while the original word "*manus*" was retained only for the rights of husbands over wives. *Mancipium* comes from *manus* and *cipio*—literally what is taken with the hand; *manumissio*, from *manus* and *mittere*, shows the word as applied to slaves and children.

In its general characteristics the *manus* resembles the *potestas*; a wife was in law in no better position than a daughter. But just as slavery falls short of the complete attributes of ownership, while the *potestas* exhibits a like advance from slavery, so the *manus* lies still further away from the characters of ownership than the *potestas*.

I. A husband acquired all his wife's property, and was responsible for her obligations to the extent of that property. (G. 2, 98; G. 3, 83; G. 3, 84.) While she was *in manu* she could not acquire any property for herself, but only for her husband. She could, however, enjoy that modified and permissive form of ownership granted to slaves and children; namely, the *peculium*.

The *manus* was, therefore, incompatible with the *potestas*: a woman that passed into the *manus* of her husband necessarily ceased to be under the *potestas* of her father. But in the time of Tiberius (Tac. Ann., 4, 16) so few persons were found to submit to the inconvenience of the *manus*, that there was a danger of an insufficient number of children being born to provide candidates for the office of Priest to Jupiter (*Flamen Dialis*), only those being eligible whose mothers were under the *manus* of their husbands; and an act was passed abrogating all the disabilities of the *manus* where the marriage was contracted by *confarreatio*.

A woman that merely passes *in manum* without making a *coemptio* does not thereby go out from her father's *potestas*. For in the case of the wife of the *Flamen Dialis*, the *lex Asinia Antistia* passed at the instance of Cornelius Maximus and Tubero, provided that she was *in manu* of her husband in regard to sacred things alone, but in regard to all else was precisely the same as if she had never passed *in manum*. But women are freed from the parent's *potestas* if it is by *coemptio* that they pass *in manum*, no matter whether of a husband or of an outsider. But those only are held to stand in the position of daughters that are in a husband's *manus*. (G. 1, 136.)

II. The husband does not seem to have possessed over his wife *in manu*, within any period reached by historical documents, the same powers of chastisement and killing that he had over slaves and children. He appears, however, to have had the

right of punishing his wife, with, in serious cases, an appeal to her relatives. The two crimes, in the punishment of which a wife's relatives had a voice, were those regarded as least venial in ancient Rome—a violation of the nuptial bed, and drinking wine. This intervention of relatives may have been the means by which the absolute authority of the husband over his wife's life was first effectually checked. (Dion. Halic., Ant. Rom., 2, 25.)

III. There is no trace of the actual sale of a wife by a husband, but a fictitious sale (*mancipatio*) was the recognised means of relieving the wife from the *manus* of her husband. Whether this fiction represents a more ancient fact, must be left to be determined by the evidence of legal institutions similar to the *manus* in other countries, for no conclusive testimony on this point is forthcoming from Roman sources.

RIGHTS AND DUTIES.

A. Rights of husband.

I. The husband had a right to the possession of his wife, a right that might be violated by theft. (G. 3, 199.)

II. He could sue any person causing an *injuria* to his wife, but this did not depend on the existence of the *manus*. (G. 3, 221.)

B. Duties of the husband.

Gaius does not say whether a wife *in manu* was subject to noxal surrender.

INVESTITIVE FACTS.

I. Purchase. *Coemptio in manum*.

In *coemptio* women pass *in manum* by *mancipatio*; that is, by a fictitious sale. At this there must be present not less than five witnesses, Roman citizens over the age of puberty, and also a balance-holder; and the woman is bought for an *as* by the man into whose *manus* she passes. (G. 1, 113.)

If we may believe Boethius, marriage was formed by mutual interrogations: the man asked the woman whether she was willing to be his *materfamilias*; she expressed her willingness, and asked in turn whether he was willing to be her *paterfamilias*. This may have been the form when the *manus* was dying out, before marriage by simple contract; but when the *coemptio* was more of a reality, we may infer that

the husband used words more distinctive of his proprietary claim—as “I declare this woman to be mine”—*Hanc ego mulierem meam esse aio.* (Boeth. on Cic., Top. 3, 14.)

II. Prescription. *Usus.*

Formerly there were three ways of passing *in manum*—*usus*, *farreum*, *coemptio*. (G. I, 110.) By *usus* a woman passed *in manum* by living with a man as his wife throughout the whole year. For the possession of her for a year gave him, as it were, a prescriptive right by *usus*; and so she passed into her husband's household, and came to hold a daughter's place. The law of the XII Tables, therefore, provided that if a woman wished not to pass in that way into the *manus* of her husband, she should stay away for three nights each year in order to break off the *usus* for that year. But all this branch of law is now gone, being partly taken away by statutes and partly effaced by mere disuse. (G. I, 111.)

This *usus* was simply the ordinary prescription. When a Roman citizen had possession of anything (except land) for a year, he obtained the full rights of ownership. A wife was capable of being thus held as property in her husband's “*manus*.”

III. A religious rite—confarreation. *Confarreatio.*

In *farreum* women pass *in manum* by a kind of sacrifice performed by the bride with a *farreum*, that is a wheaten cake (*farreus panis*), from which the ceremony is named *confarreatio*. But, besides, in order to establish this right, many other acts and things are done, and a set form of words used in the presence of ten witnesses. Nor is this right disused even in our time, for the greater *Flamines*—namely, the *Dialis*, the *Martialis*, the *Quirinalis*, and also the *Rex Sacrorum*—must be begotten in marriage celebrated by *confarreatio*. And a *Flamen* too, if he marries, must do so by *confarreatio*. (G. I, 112.)

It has been already stated that after the time of Tiberius *confarreation* ceased to invest the husband with the *manus*, but gave the wife a right to participate in the family sacred rites.

The ceremony of *confarreation* took place before the chief Pontiff (*Pontifex Maximus*) and the Priest of Jupiter (*Flamen Dialis*).

Upon the relative antiquity of these modes of acquiring the *manus* Mr. McLennan makes the following interesting observations (*Primitive Marriage*, 1st edit., p. 13):—

“Apart from the tests of truth afforded by the minute knowledge of primitive modes of life and their classification as more or less archaic, nothing could be more delusive than written history itself. In Roman law, to take a convenient example, *confarreatio* has the foremost place among the modes of constituting marriage (rather say the *manus*). *Usus* is just mentioned in the XII Tables, which contain a provision against a wife coming into the *manus* of her husband through *usus*. *Coemptio* does not appear in the old law of Rome at all, nor is

there any mention of it earlier than that by Gaius.¹ But it can easily be shown that *usus* and *coemptio*, come first in order of age, and *confarreatio* later: that is to say, the two former are more archaic than the latter. Yet have recent learned writers, overlooking this fact and the meaning of legal symbolism, represented *usus* and *coemptio* as forms invented and introduced by the legislators of Rome, whereby the Plebeians might have their wives *in manu*, and enjoy the other advantages of *justae nuptiae*; *usus* as an invention, and the fictitious sale in *coemptio* as merely a device of legislative ingenuity. The true explanation of the late appearance of both *usus* and the fictitious sale in the Roman law is this, that the law at first was not that of the whole people, but of a limited aristocracy, who, with a Sabine king and priesthood, adopted the Sabine religious ceremony of marriage; that the law totally ignored the life and usages of the mass, and that *their* modes of marrying and giving in marriage began to appear, and to make their mark in the law, only on the popular element in the city becoming of importance. Instead of marriage *per coemptionem* being the invention of legislators, it was of spontaneous popular growth, and must have been as old as the establishment of peaceful relations between tribes and families. All fictions, or nearly all, have had their germs in facts; became fictions or merely symbolical forms afterwards. And that the fictitious sale was originally an actual sale and purchase, cannot be doubted by any one who knows that marriage, by the form of actual sale, has prevailed almost universally among rude populations." In the opinion of Mr. McLennan, the legend of the "Rape of the Sabine Women" refers to a still earlier and ruder form of marriage, in which the bride was not peacefully bought, but stolen by treachery or carried off by violence.

DIVESTITIVE FACTS.

A. Voluntary, by the act of the parties.

1. Re-purchase. *Remancipatio*.

By re-conveyance (*remancipatio*) also women cease to be *in manu*; and manumission after the re-conveyance makes them *sui juris*. And if a woman has made a *coemptio fiducia causa* with an outsider, she can compel him to reconvey her. But if a woman has made a *coemptio* with her

¹ This is a mistake. Both *usus* and *coemptio* are mentioned by Cicero, *Pro Flacco*, 34.

husband, and wishes to be reconveyed by him, she can no more (directly) compel him than a daughter can a father. But while a daughter cannot in any way compel a father, even if only an adoptive father, to reconvey her, a wife can by sending a divorce compel her husband to reconvey her just as if she had never been married to him. (G. 1, 136 A.)

The same form was probably used whether the wife had fallen into the *manus* of her husband by *coemptio* or *usus*.

II. Diffarreation (*Diffarreatio*). We learn from Plutarch (*Quaest. Rom.* p. 270) that the marriage of confarreation was dissolved by a sacrifice under the authority of the Pontiff, who took care that it should be infrequent and costly. The sacrifice is said to have required certain abominable rites. The wife of the *Flamen Dialis* could not be divorced.

B. Involuntary divestitive facts.

Women *in manu* are freed therefrom like daughters *in potestate*;—by the death, for instance, of him in whose *manus* they are, or by his being forbidden the use of fire and water. (G. 1, 137, restored.)

REMEDIES.

We have no precise information upon this head. The husband could divorce his wife when he pleased, but it seems from Gaius that the wife did not enjoy the corresponding privilege. (G. 1, 137 A.)

Any question as to the existence of *manus* was probably decided in the same manner as other questions of status; but upon this subject Gaius gives us no information.

IV.—MANCIPIMUM.

DEFINITION.

The subject of *mancipium* belongs wholly to the antiquarian side of Roman Law. In the time of Gaius, from whom the substance of our information is derived, the *mancipium* was (except in one case) a purely fictitious legal *status*, resorted to, as has been seen, in adoption and emancipation.

Those persons were said to be *in mancipio* who had been the objects of the ancient form of the conveyance called mancipation (*mancipatio*). Slaves were often called *mancipia*, although the word *mancipium* is more generally confined to free persons. (D. 1, 5, 4, 3.)

We have still to tell further what persons may be *in mancipio*. (G. 1, 116.)

The persons, then, of all children, whether male or female, in the parent's *potestas*, can be conveyed by *mancipatio* just as slaves can. (G. 1, 117.)

The same right is enjoyed over the persons of women in *manu*; for they can be conveyed by *mancipatio* by their *coemptionatores* in the same way as children by a parent. And so far is this carried, that although no one stands to the *coemptionator* in the position of a daughter unless she is married to him, yet none the less one that is not married to him, and therefore not in the position of a daughter, can be conveyed by him by *mancipatio*. (G. I, 118.)

But often the whole aim of *mancipatio* by parents and *coemptionatores* is to release those persons from the rights enjoyed over them, as will appear more clearly below. (G. I, 118 A.)

RIGHTS AND DUTIES.

Those who were in *mancipio* were said to be in the place of slaves (*servorum loco*). But the holder was not permitted to ill-use them, from which it may be inferred that *mancipium* resembled a pledge more than a sale.

And lastly, we should observe that those we hold in *mancipio* must not be treated with insult; or if we do, we shall be liable to an *actio injuriarum*. For no long time indeed are men kept in that condition; but usually *mancipatio* is merely for form's sake, and is over in an instant,—unless, indeed, when it is the consequence of some wrong (*ex noxali causa*). (G. I, 141.)

INVESTITIVE FACTS.

A. Mancipation (*Mancipatio*).

Mancipatio is, as we have said above, a fictitious sale; and the right is peculiar to Roman citizens. The process is this:—There are summoned as witnesses not less than five Roman citizens above the age of puberty, and another besides, of the same condition, to hold a balance of bronze, who is called the *libripens*. This last, who receives the object in *mancipio*, holding a piece of bronze (*aes*), speaks thus:—"I say this man is mine *ex jure Quiritium*, and he has been bought by me with this piece of bronze and balance of bronze." Then with the piece of bronze he strikes the balance, and gives the piece of bronze, as if the price to be paid, to him from whom he receives the object in *mancipio*. (G. I, 119.)

The *aes* of the Roman coins was bronze, a mixture of copper, tin, and lead. Brass (*orichalcum*) was a mixture of copper and calamine or zinc.

The reason for using a piece of bronze and a balance is this:—That of old the only money in use was of bronze—the *as*, namely, the double *as*, the half *as*, and the quarter; but no gold or silver coin, as may be seen by the XII Tables. And the worth and (purchasing) power of those coins depended not on number, but on the weight of bronze. The *as*, for instance, weighed one pound, the double *as* (*dipondius*) two—whence its name, a name still in use. The half *as* too, and the quarter, had a fixed weight in proportion to their amount as fractions of a pound. And the money, too, of

old, when paid, was not counted, but weighed. And hence slaves entrusted with the management of money were called, and are still called, *dispensatores* (weighers). (G. 1, 122.)

If, however, any one should ask wherein a woman that has made a *coemptio* differs from one conveyed by *mancipatio*, the answer is this:—A woman that has made a *coemptio* is not dragged down to the condition of a slave. But men or women conveyed by *mancipatio* by parents or *coemptionatores* are placed in the position of slaves; and so fully is this the case that from him that holds them *in mancipio* they can take neither an inheritance nor legacies unless the same will at the same time ordain that they shall be free,—the very law that applies to the condition (*persona*) of slaves. And the reason of the difference is plain; for parents and *coemptionatores* receive them *in mancipio* with the very same words with which they receive slaves; and this is not the case in *coemptio*. (G. 1, 123.)

DIVESTITIVE FACTS.

A. Modes of release.

Persons *in causa mancipii*, since they are looked on as standing in the position of slaves, are manumitted by *vindicta*, by entry in the census, or by will, in order to make them *sui juris*. (G. 1, 138.)

B. Restraints.

But to this case the *lex Aelia Sentia* does not apply; therefore no limit of age is required from either the manumitter or the manumitted. Nor is it even asked whether the manumitter has a patron or a creditor. And the number limited by the *lex Furia Caninia* does not apply to these persons. (G. 1, 139.)

Nay, more: Even against the will of him that holds them *in mancipio* they may be entered in the census, and so gain their freedom. But with one exception,—when the father has conveyed a son by *mancipatio* on the express condition that he shall be reconveyed to him; for then the father is held to reserve in a measure his own *potestas* in the very fact that he recovers by *mancipatio*. And again, a son cannot gain his freedom by being entered in the census against the will of the holder *in mancipio*, if his father has surrendered him on the ground of some wrong-doing (*ex noxali causa*); if, for instance, the father has been condemned on the score of a theft by the son, or has surrendered the son by *mancipatio* to the pursuer; for the pursuer has him instead of money. (G. 1, 140.)

REMEDIES.

A. In respect of rights and duties. For injury done to the *mancipium* an action lay for damages against the person that held the *mancipium* by the person that had given the *mancipium* (*actio injuriarum*). (G. 1, 141.)

B. In respect of investitive facts the remedy was doubtless the *vindicatio*, or real action; but Gaius is silent on the subject.

Third Division.

RIGHTS IN REM TO THINGS.

FIRST SUBDIVISION.

INDEPENDENT RIGHTS—i.e., CREATED FOR THEIR OWN SAKE.

I.—OWNERSHIP. *DOMINIUM*.

DEFINITION.

In the Roman Law, *dominium* is used sometimes with a narrower, and sometimes with a wider, signification. In the wider signification, the law of ownership includes everything that is brought under the third division of rights *in rem*—namely, all rights *in rem* over things. In this sense, ownership is contrasted with *obligatio*, which may be taken as equivalent to rights *in personam*. (D. 44, 7, 3.) But *dominium* is generally used with a more restricted application, as the name for the largest interest in things, as opposed to the lesser interests. It “denotes a right—indefinite in point of user, unrestricted in power of disposition, and unlimited in point of duration—over a determinate thing.” (Austin’s *Jurisprudence*, 817.) Such is the correct notion to start with, but we shall find cases where a person is called owner, whose rights are not so unlimited as the definition requires.

RIGHTS AND DUTIES.

The rights of an owner may be briefly comprised under two heads—a right to the exclusive use of the thing belonging to him, and a right to alienate it. These two rights do not necessarily go together, but they are generally united in the Roman Law.

The chief instances of incapacity of owners to alienate will be examined elsewhere; at this stage they need only be enumerated.

1. Persons of unsound mind, or prohibited by order of a court from the management of their property (*cui bonis interdicitur*).

2. Now we must note that a pupil can alienate nothing without the authority (*auctoritas*) of the tutor. (J. 2, 8, 2.)

Now we must note that a woman or a pupil can alienate no *res Mancipi* without the authority of the tutor. A *res nec Mancipi* a woman can alienate, but a pupil cannot. (G. 2, 80.)

Pupil, tutor are explained in (Book II. Div. II., *Tutela*). *Res Mancipi* will be explained presently. (*Dominium*. Investitive Facts.)

3. A husband (see *Dos*) cannot alienate the immoveables brought by a wife as part of her dowry.

On the other hand, the agnate that is curator of a madman may alienate his property under the statute of the XII Tables. And a *procurator*, too, may alienate the property of the principal that has intrusted him with its management. (G. 2, 64.)

These exceptions serve to illustrate the generality of the rule that every owner had unrestricted power of alienation; and we need not at present further consider this element of ownership.

The next question is, What is the nature of that exclusive use that constitutes ownership, and in what manner may the owner's rights be violated? The answer embraces necessarily an account of the wrongs that may be done to an owner in respect of his property. In enumerating these it is convenient to adapt our arrangement to the distinction between moveable and immoveable things. Immoveable things are such as land, and whatever is fixed in or to it; moveable things cannot be more clearly explained than by their name. They are such things as may be moved from place to place, as furniture, horses, cattle, slaves, garments, wine, corn, &c.

First, RIGHTS TO MOVEABLES.

A. Rights of the owner (*dominus*).

A right to a moveable may be violated in two ways; (1) It may be taken away from the owner; and, (2) without being taken away, its usefulness may be impaired. A wrong to an owner of a moveable may be, therefore, an offence against possession, or an offence against the usefulness of the moveable.

(A.) Deprivation of possession.

In two ways an owner may be deprived of his moveable—by force or by fraud, against his will or without his consent. The former is robbery; the latter, theft. We shall first state the law regarding theft.

I. THEFT (*furtum*). A doubt was at one time entertained

whether theft was not an offence applicable also to immovables. (D. 41, 3, 38.) Sabinus thought it was, but the Proculians, whose opinion is sanctioned by Justinian, relying upon the etymology of the word (from *fero*, to carry off), held that theft was an offence against moveables only. (D. 47, 2, 25.) The Roman jurists did not, however, fall into the error made by Lord Coke and his successors in England, of treating things attached to immovables as partaking of the same character, and of holding that stealing them was a mere trespass, not theft. It was held that trees or growing fruit might be the object of theft (D. 47, 2, 25, 2), and so, likewise, stones, sand, or chalk dug up and carried away. (D. 47, 2, 57.)

Theft (*furtum*) is the dealing with an object, or with its use or possession, with intent to defraud,—an act forbidden by the law of nature. (J. 4, 1, 1.)

The term *furtum* comes either from *furvus* (black), because theft is done in secret, and in the dark, and often by night; or from *fraus* (fraud); or from *ferre*, that is, to carry off; or from the Greek, φῶρ,—their name for thieves, which comes itself from φέρω (I carry off). (J. 4, 1, 2.)

The action for theft could be brought by persons not owners, and it will be convenient to state the cases in this connection. The following arrangement is adopted:—

α. The elements of theft in the Roman law.

1. Theft of a thing (*rei furtum*).
 - 1°. Handling or dealing with a thing (*contractatio*).
 - 2°. The absence of consent of the owner (*invito domino*).
 - 3°. The knowledge of the absence of consent (*fraudulosa*).
2. Theft of the use of a thing (*usus furtum*).
3. Theft of the possession of a thing (*possessionis furtum*).

β. Persons (not owners) that can sue for theft.

1. Those having rights *in rem*.
2. Those having rights *in rem* delegated by the owner.
3. Those having only rights *in personam*.

γ. Abetting theft—accomplices.

α. The constituent elements of theft.

1. Theft of a moveable (*furtum rei*).

1°. There must be an actual handling or exercise of physical power over the thing (*contractatio*). A mere intention to steal, whether uttered in words (D. 47, 2, 52, 19) or not (D. 47, 2, 1, 1), is not theft.

Illustrations.

A by telling a lie induces B to make a promise to C. This is not theft, because there is a mere promise to perform, not anything capable of being touched or dealt with. (D. 47, 2, 75.)

A sells B's slave without B's knowledge or consent, but the slave continues in B's possession. This is fraud, but not theft. If, however, A detained B's slave and sold him, it would be theft. (C. 6, 2, 6.)

A, pretending to be B's creditor, requests B to make payment of the debt to C. If the payment is made by B to C in A's presence, it was the same as if the money were given by B to A, and by A to C, and the offence was theft; but if the payment was made in A's absence, it was not theft, inasmuch as the money was never handled by A at all. (D. 47, 2, 43.)

2°. The *contrectatio* must be without the consent of the owner (*invito domino*). The owner is understood to forbid, if he does not consent. (D. 47, 2, 48, 3.) This, of course, is merely an aspect of the rule, that no wrong can be done to a man with his consent.

Illustrations.

A intends to make B a present of a walking-stick. B, without knowing A's intention, desires to appropriate it, and carries it away. Although B was guilty of a fraudulent appropriation, his act was not theft, on account of the consent of A, although such consent was unknown to B. (D. 47, 2, 46, 8.)

And even though a man believes that it is against the owner's will that he is dealing with property lent him free, still if the owner is in fact willing, it is said there is no case of theft. And hence this question has been raised [and decided]. If Titius solicits Maevius' slave to steal certain property of his master's, and to bring it to him; and the slave reports this to Maevius; and Maevius, wishing to arrest Titius in the very act of wrong-doing, allows the slave to take certain property to him, then is it to an *actio* for theft or for corrupting the slave (*servi corrupti*) that Titius is liable, or to neither? [And the answer is, to neither; not for theft, because it was not against the owner's will that the property was dealt with; and not for corrupting the slave, because the slave is none the worse.] (J. 4, 1, 8; G. 3, 198.)

This doubtful point was referred to us, and we looked through the discussions on it by the old jurists; some of whom allowed neither action, some that of theft only. But we set our face against such subtlety, and by our decision formally settled that both actions are to be given. For although the slave is not one whit the worse for the solicitations, and therefore the rules under which the *actio servi corrupti* is brought in do not altogether meet the case; yet the design of the corrupter to ruin the slave's uprightness is brought in, so that he is exposed to a penal action, just as if the slave had in fact been corrupted. For a criminal attempt of this sort must not go unpunished, lest it be repeated by some one on another slave that can be corrupted. (J. 4, 1, 8.)

Closely akin to those cases are the instances where an owner parts with his property voluntarily, but under a false pretence. When the false pretence was the personation of a person that had a legal claim, the rule seems to have been applied, that he that is deceived does not consent. But other false pretences

could only be dealt with as fraud, giving rise to an action on that ground (*actio de dolo*), and did not fall under the head of theft.

Illustrations.

A, a slave, goes to a money-lender, and procures an advance of money on the representation that he is free. This is not theft, but simple fraud (*dolus*). (D. 47, 2, 52, 15.)

A obtains a loan by falsely pretending (1) that he is rich, or (2) that he will spend the money on merchandise, or (3) that he will give good securities, or (4) that he will immediately repay it. This is not theft, but would support an action for fraud. (D. 47, 2, 43, 3.)

Seius arranges to give a loan to Titius, a respectable citizen. Pomponius, knowing that Seius is not personally acquainted with Titius, takes to him another Titius, a man without character or means, and succeeds in obtaining the loan, the proceeds of which he shares with the spurious Titius. Titius commits theft, and Pomponius is an accomplice. (D. 47, 2, 52, 21.)

A slave accustomed to collect money due to his master is manumitted, and, concealing the fact, recovers sums from the debtors of his master. This is theft, because it is a personation of one entitled to collect money. (D. 47, 2, 66, 5.)

Gaius appoints Sempronius his procurator to collect his debts, and notifies the fact to his debtors. Titius goes round, and, pretending to be Sempronius, obtains payment to himself. This is theft. (D. 47, 2, 80, 6.)

3°. To constitute theft, the thief must know that he has not the consent of the owner (*fraudulosa contrectatio*).

There is no theft without an intention to deprive a person of his property, or of the enjoyment of it. In this respect theft corresponds to *injuria*. Theft is an intentional violation of a man's right to his moveable property; *injuria* is a wilful infringement of a man's right to his own person, safety, or reputation.

In the Roman Law theft seems to imply two elements: the desire to deprive an owner of his goods without his knowledge, and therefore generally by stealth; and a desire to appropriate them to the thief's own use.

Illustrations.

A ship is in danger of being wrecked, and amongst other things a cask of wine is thrown overboard near the shore. Titius, who sees the vessel in distress, watches the cask, and when it is driven ashore, carries it home and consumes the wine. This is theft. There may have been no concealment in the manner of carrying off the cask, but it was against the wishes of the owners, and therefore theft. (D. 47, 2, 43, 11.)

A picks up in the street a ring that he knows to be B's, intending to return it to B. This is not theft. (D. 47, 2, 43, 7.)

Titius steals a ring to give it as a present to another. This is theft, because it is *lucri causa*.¹ (D. 47, 2, 54, 1.)

¹ *Species enim lucri est, ex alieno largiri, et beneficii debitorem sibi acquirere.*

A thief breaks a casket and carries off the jewels. He is not guilty of stealing the casket, but he is of stealing the jewels. (D. 47, 2, 22, pr.)

A deposits a box with B for safe custody on going a voyage. On A's return, B falsely denies the deposit with the intention of keeping the box himself. Does B commit theft? No, says Celsus; because the possession of B was in the first instance lawful. If, however, B had intended from the first to defraud A, it would be theft. (D. 47, 2, 68, pr.) According to this decision, the fraudulent intent must exist at the moment of acquiring possession; but this can hardly be reconciled with a text from Ulpian, which states that a creditor, who, after receiving payment, retains the pledge, with the intention of appropriating it furtively to himself, commits theft. (D. 47, 2, 52, 7.)

A gives B some money to carry to C. B carries it, gives a portion to C, and keeps the rest for his own use. This is theft. (C. 6, 2, 7.) But if B was not bound to deliver the identical coins, it was merely breach of contract. (D. 17, 1, 22, 7.)

Cheating by means of false weights is theft of the quantity of which the purchaser is deprived. (D. 47, 2, 52, 22.)

2. Theft of the use of a thing (*furtum usus*).

Theft, in its general sense, includes not only the taking away of what is another's in order to deprive him of it and keep it, but all dealing with what is another's against the owner's will. Thus it is theft for a creditor to make use of a pledge (*pignus*); for a man with whom anything is deposited, to make use of that thing; for a borrower that has received something to use, to put it to any use other than that for which it was given. It is theft, for instance, if a man receives plate, to be used at a dinner he is going to give his friends, and then carries it off to the country with him; or if he has a horse lent him free (*commodatum*) for a ride, and takes it beyond a certain distance—as in the case mentioned in the old writers, where the man took the horse into battle. (J. 4, 1, 6; G. 3, 195.)

It is decided, however, that those that put things lent them free for one use to another use, are not to be held guilty of theft unless they know that they are acting against the owner's will, and that he, if he knew it, would not allow them; and if they believe that he would allow them, they are clear of the charge. And the distinction is certainly an excellent one; for where there is no theftuous purpose (*affectus furandi*) there is no theft. (J. 4, 1, 7; G. 3, 196.)

1°. CONTRACT OF DEPOSIT.—It was the essence of this contract that the person with whom anything was deposited should not use it; his sole duty was to keep it safe. The question is, what use of it amounts to theft, and what only to breach of contract? The difficulty is that every use implied an absence of authority, and therefore a prohibition (*prohibet qui non consentit*). Suppose a ring were left in deposit, and the receiver wore it, there can be no doubt that this breach of contract would throw on the receiver the risk of the thing; and if it were lost by accident, he would be obliged to pay for it; whereas if he had not worn it, he would not have been liable without being guilty of fraud. But would it be theft? It all depends, says Justinian, on the intention. If the receiver knew that the depositor would never have allowed him to wear it, then he is simply taking advantage of his position to cheat the owner of the use of the thing. (D. 13, 1, 16.)

2°. CONTRACT OF LOAN.—This differs from deposit, inasmuch as it implies a limited or prescribed use granted to the borrower, who takes advantage of the possession given him to use the thing for a different purpose. The case in the text where A, on the

pretence of giving a supper, borrows plate, and carries it on a journey, illustrates the idea of theft. If A had borrowed the plate *bona fide*, having no ulterior purpose, but afterwards, being suddenly called away, presumed that the lender would allow him to take the plate with him, he committed no theft; but as he exceeded the limits prescribed, he rendered himself liable for all loss by accident.

3. Theft of possession.

Sometimes, too, a man may commit a theft even of his own property; as when a debtor removes by stealth what he gave a creditor as a pledge [or when I carry off by stealth property of mine of which some one else is possessor in good faith. And hence it is held that if a man hides his own slave that comes back to him, while possessed by some one else in good faith, he commits a theft]. (J. 4, 1, 10; G. 3, 200.)

1. Theft from CREDITOR. The equity of this case is manifest. The creditor has a right to the pledge in his possession until the debt is discharged, and to permit the owner to carry the thing off by stealth would be to allow him by fraud to deprive his creditor of his security. But the provisions of the Roman Law went much further. Even if the thing pledged remained in the possession of the debtor, and the debtor fraudulently disposed of it, he committed theft. The contract of pledge gave the creditor a right *in rem* to the thing pledged, and a wilful violation of this right was, as in other cases, treated as a theft.

Illustration.

Titius let to Sempronius a farm, and, according to the usual custom, an agreement was made that the crops (*fructus*) should be a security for the rent. Sempronius secretly carries away his crop to deprive Titius of his security. This was theft. (D. 47, 2, 61, 8.)

2. BONA-FIDE POSSESSOR.—A *bona-fide* possessor is one that has received a thing belonging to another in such a manner as to justify him in believing himself to be owner. The owner had a remedy against him for the recovery of the thing, but, as decided by Gaius, if he fraudulently carried it off, it was theft.

A thief or other person that possessed what he believed to belong to another (*mala fide possessor*) could not bring an action for theft, although he had sufficient right to the possession to support an action for the recovery of the thing itself (*condictio furtiva*). (D. 47, 2, 12, 1; D. 47, 2, 76, 1.)

β. Persons (not owners) that could bring an action for theft.

1. Persons having rights *in rem* to things.

1°. One that had a usufruct—i.e., the right to the use and produce of any property for life or a definite period—could bring the action of theft even against the owner. If the owner was not the thief, both he and the usufructuary could bring the action. (D. 47, 2, 46, 3.)

2°. The person that was entitled to the use only, not the produce (*usuarius*), had the same rights in this respect. (D. 47, 2, 46, 1; D. 47, 2, 46, 3.)

3°. The *bona fide* possessor, and

4°. The creditor.

The *actio furti* is open to any one that has an interest in the safety of the thing stolen, even though he is not the owner. And therefore it is open to the owner only if it is to his interest that the thing should not be lost. (J. 4, 1, 13; G. 3, 203.)

Hence it is agreed that a creditor can bring the *actio furti* for a pledge that has been stolen, even although he has a debtor able to pay; for it is his interest rather to rest his claim on the pledge, than to bring an *actio in personam*. And so entirely does this hold, that although it is the [owner, *i.e.* the] debtor himself that has stolen the thing in pledge, none the less the creditor may avail himself of the *actio furti*. (J. 4, 1, 14; G. 3, 204.)

Thus several persons may have an action for theft when a thing is stolen.

Illustration.

A gives his slave to B in security for a debt, but retains possession. Afterwards A delivers the slave to C in usufruct. The slave is stolen. C has an action for damages for what he loses by the theft. (D. 47, 2, 46, 1.) B has also an action for theft for the value of the slave, not of the debt (D. 47, 2, 87); and if there remains anything over, A has an action for the amount by which the value of the slave exceeds that of the debt. (D. 47, 2, 46, 4.)

-2. Persons having an interest in a moveable in consequence of a contract.

1°. Letting to hire (*Locatio-conductio*).

And again if a fuller or tailor takes clothes to be cleaned and done up or to be mended for a fixed price, and they are stolen from him, it is he, and not the owner that has the *actio furti*. For the owner, has no interest in seeing that the property is not lost, since he can recover in court by an *actio locati* from the fuller or tailor all that is his. And a purchaser in good faith too, if the thing he bought is made away with, may (although he is not its owner) avail himself in any case of the *actio furti* just as a creditor might. But the fuller and tailor, it is held, can avail themselves of the *actio furti* only if they are solvent; that is, able to pay the value of the property to the owner. For if not, then the owner, since he cannot recover from them what is his, may himself bring the *actio furti*; for in this case the safety of the property is his interest. And it is the same if the fuller or the tailor is only partly solvent. (J. 4, 1, 15; G. 3, 205.)

In the Roman Law, theft was treated as conclusive evidence of negligence, and all that were bound to show diligence in keeping, were responsible for theft. (D. 47, 2, 14, 12. D. 47, 2, 14, 15.)

2°. Loan (*Commodatum*).

All that we have said of the fuller and the tailor ought to be applied also, the ancients thought, to the borrower (*cui commodata res est*). For as they take pay, and therefore are answerable for the safe-keeping of the thing; so he, by enjoying the advantage of its use, necessarily makes himself answerable in like manner. But our wisdom has amended this, among our other

decisions. And now the owner has the option of bringing an *actio commodati* against the borrower if he wishes, or an *actio furti* against the man that stole his property. But after choosing one of these two, the owner cannot change his mind and have recourse to the other. If he has chosen to proceed against the thief, then he that received the thing to use is entirely freed. But if, again, the lender proceeds against him that received the thing to use, then in no way can he avail himself of the *actio furti* against the thief. The borrower, however, when sued for the thing lent him, may have this action against the thief, if only the owner knew that the thing was stolen, and yet proceeded against him to whom it was lent. But if he was ignorant and in doubt whether the property was not with the borrower when he brought the *actio commodati*, and afterwards, on ascertaining the fact, wished to give up that action, and to have recourse to the *actio furti*, then full leave is granted him to do so, and to proceed against the thief without let or hindrance. For he was still in a position of uncertainty when he brought the *actio commodati* against him that received the thing to use. If, however, the borrower has already compensated the owner, then in any case the thief is free from an *actio furti* on the part of the owner; and in the owner's room comes the borrower that has made compensation to the owner for the thing lent him. And it is plain, further, beyond all doubt, that if at first the owner brings the *actio commodati* in ignorance that the thing has been stolen, and afterwards, when he knows this, proceeds against the thief instead, that in any case he is freed that received the thing to use, no matter what the issue of the owner's action against the thief. And the same rules hold whether the man that received the thing on loan is partly or entirely solvent. (J. 4, 1, 16; G. 3, 206.)

When the owner secretly carried off the thing lent from the borrower, it was not theft, unless the borrower had a balance of claim against him for expenses, in which case he had an interest in the retention of the thing, and could sue the owner for theft. (D. 47, 2, 15, 2; D. 47, 2, 59.)

3°. Deposit.

He with whom a thing is deposited is not answerable for its safe keeping, but is liable only for his own acts of wilful wrong-doing (*dolo malo*). And therefore, if the thing is stolen from him, since he is not liable to an *actio depositi* for its restoration, and thus has no interest in its safety, he cannot bring an *actio furti*, but the owner can. (J. 4, 1, 17; G. 3, 207.)

These cases, where a person whose interest in a thing is based wholly on a relation of contract can bring an action for theft, seem to be opposed to the general conception of theft; namely, as an offence against a right *in rem*. The hirer or borrower, however, has certainly a right *in rem* to the thing hired or borrowed, derived from the consent of the letter or lender, and limited thereby. The hirer enjoys by a species of delegation the owner's right to the possession of the thing. Hence, a person in the absence of the owner, and therefore without his authority, undertaking the custody of

his property (*negotiorum gestor*), although responsible for everything that was stolen, could not sue the thief. (D. 47, 2, 85.) In like manner a tutor, whose powers were conferred on him by law, and were not derived from the consent of the pupil, could not sue for theft of the pupil's property, although he was bound to make good the loss. It could not be said that the pupil had delegated to the tutor the right of possession, and with it the right to sue the thief that deprived him of the possession. But in these cases the owner could not require the tutor or agent to make good the loss, without first giving up his rights of action against the thief. (D. 47, 2, 53, 3.)

3. A person having only a right in *personam* in respect of a thing, could not bring the action for theft.

Illustrations.

A bequeaths Stichus to B. Before Stichus is delivered to B he is stolen. B has no action for theft. (D. 47, 2, 85.)

A sells Stichus to B, but before delivery Stichus is stolen. B, inasmuch as he does not become owner until Stichus is delivered to him, cannot sue the thief. He can, however, under the contract, require A to allow him to sue the thief in A's name. (D. 47, 2, 14, 1.) This opinion was not held by Paul, who argued that both purchaser and vendor could sue the thief, inasmuch as each had an interest in the safe delivery of the slave. (Paul, Sent. 2, 31, 17.)

A sells Stichus to B, and B carries off Stichus furtively, without paying the price. B commits theft. (D. 47, 2, 14, 1 ; D. 47, 2, 80, pr.)

γ. Abettors of theft.

1. What is abetting?

Sometimes a man is liable to an *actio furti* that has not in person committed a theft ; as, for instance, he that has aided and advised a theft. But, certainly, he that has lent no aid to the commission of a theft, but only advised and encouraged the thief, is not liable to the *actio furti*. (J. 4, 1, 11 ; G. 3, 202.)

Illustrations.

Among these are to be reckoned the man that knocks money out of your hand in order that another may make off with it ; or that stands in your way in order that another may steal what is yours ; or that puts your sheep or oxen to flight that another may take them as they flee—as in the case in the old writers of the man that put a herd to flight by means of a red cloth. But if any such act is done wantonly, and not to aid in the commission of a theft [we shall see whether the *utilis actio* under the *lex Aquilia* ought to be given—for the *lex Aquilia de damno* punishes even carelessness], an *actio in factum* ought to be given.

He too aids and advises the commission of a theft that places ladders under the windows, or breaks open the windows or a door in order that another may commit a theft ; or that lends iron tools to break open a house, or ladders to put under windows knowing for what purpose they are lent. (J. 4, 1, 11 ; G. 3, 202.)

A tame peacock has escaped, and A pursues it with the intention of stealing it. The bird is exhausted and caught by B. A is liable for theft. (D. 47, 2, 37.)

A persuades B's slave to run away. This is not theft; but if the slave carries with him any of his master's property, A is said to abet the theft. (D. 47, 2, 36, 2.)

2. Responsibility of abetting.

But when Maevius aids Titius in committing a theft, both are liable to the *actio furti*. (J. 4, 1, 11; G. 3, 202.)

Each person abetting or aiding a theft is responsible as if he alone had done it; so that payment by the others of the penalties they have incurred does not exonerate him. This rule, which was adopted from a feeling of hostility to thieves, pressed with great hardship on a man when several of his slaves were concerned in the theft of a single article. (*Si familia furtum fecisse dicetur*, D. 47, 6.) The Praetor, therefore, gave an option to the master, either to surrender all the slaves that had been concerned in the theft, or to pay the amount that a single freeman would have had to pay if he alone had committed the theft. (D. 47, 6, 1.) Every master got the benefit of this option, if the theft had been committed without his knowledge or against his orders. It may be added that the same option was given to the master when several of his slaves had committed damage (*damnum injuria*), (D. 9, 2, 32), or robbery (D. 47, 8, 2, 14), but not when the offence was against the person of a freeman (*injuria*). (D. 47, 10, 34.) In this latter case the responsibility of the master was estimated as if each slave were free.

It is to be noted also that a person might be responsible for abetting a thief when the principal was not.

Persons in the *potestas* of parents or masters, if they steal from them, commit a theft, and the thing taken becomes stolen property; and no one, therefore, can acquire it by *usucapio* before it returns into the owner's power. But the *actio furti* does not arise, because on no ground can an action arise between them. If, however, some one else has aided and advised the theft, since a theft is actually committed, he is accordingly liable to the *actio furti*; because, in truth, the theft was accomplished by his aid and advice. (J. 4, 1, 12.)

3. Vicarious responsibility.

And, again, the master of a ship, or an innkeeper, or a livery-stable keeper, is liable to an *actio quasi ex maleficio* for any loss suffered by wilful wrong or theft committed in his ship, or inn, or stable: provided always that the wrong-doing (*maleficium*) is not his personal act, but that of some one employed by him in the management of the ship, or inn, or stable. For since in this case there is no action against him *ex contractu*, and since he is to

some extent in fault for employing wicked servants, he is liable to an *actio quasi ex maleficio*. In these cases it is an *actio in factum* that is open,—a remedy given to an heir, but not against an heir. (J. 4, 5, 3.)

4. And finally, we must observe, the question has been raised whether a person under puberty, that takes away what is another's, commits a theft. It is held [by most] that as theft essentially implies a theftuous aim, a person under puberty incurs an *obligatio* on such a charge only if very near the age of puberty, and well aware, therefore, of the wrongful nature of his acts. (J. 4, 1, 18; G. 3, 208.)

II. ROBBERY. *Vi bonorum raptorum*. Like *furtum*, this offence is confined to moveables. (C. 9, 33, 1.)

A robber is liable also to an *actio furti*. For who deals with what is another's more against the will of the owner than he that robs by force? And therefore he is rightly called a shameless thief. There is, however, a special action grounded on that offence which the Praetor brought in, called *vi bonorum raptorum*. (J. 4, 2, pr.; G. 3, 209.)

This action, however, is open only against him that forcibly carries off goods with the intention to do a wilful wrong (*dolo malo*). He, therefore, that is led by some mistake to think a thing his own, and in his ignorance of law carries it off by force in that spirit, supposing that an owner may take away what is his even by violence from its possessors, ought to be acquitted. And in accordance with this he that has carried off goods by force in that same spirit is not liable to an *actio furti*. (J. 4, 2, 1.)

Illustration.

A tax-gatherer carries off cattle of a farmer to satisfy a claim that turns out to be unfounded. He does not commit robbery, because he believes he has a right. (D. 47, 8, 2, 20.)

In this action it is not essential that the property should be *in bonis* of the plaintiff. For whether it is *in bonis* or not, if only it is *ex bonis* (was part of his goods), the action will stand. And so, if anything has been borrowed or hired by Titius, or is even left in pledge or deposited with him on such terms that he has an interest in keeping it from being taken away—if, for instance, in the case of a deposit, he has promised to answer for negligence (*culpa*)—or if he is possessor in good faith, or has a usufruct or any other right creating an interest in preserving the goods from the robber—then we must say that to him this action is open. ~~And~~ by it he gains not ownership, but only what he, as victim of the robbery, claims to have had taken away from among his goods—that is, from among his substance. And generally we must say, that whatever grounds give rise to an *actio furti* in case of secret theft, those same grounds will support this *actio* for any one (if open force is used). (J. 4, 2, 2.)

But a thoughtful care for such cases as these may only open up a way for robbers to satisfy their greed and pass unpunished. And therefore a wiser provision has been made in this respect by the constitutions of our imperial predecessors. For no one is allowed to take by force anything that is moveable or self-moving, even although he thinks that same thing his

own. And if any one acts contrary to the statutes, if the thing is his own, then he ceases to be owner; and if it is another's, he must first restore the thing and then make good also its value. And this applies not only to moveables that can be taken away by force, but (as the constitutions declare) to cases of forcible entry on any landed property, in order to stop men from every form of robbery on such pretexts. (J. 4, 2, 1.)

This remedy was introduced by Valentinian Theodosius and Arcadius A.D. 389. (C. 8, 4, 7.)

(B.) Offences against Usefulness. (*Damnum Injuria.*)

Provision was made in the XII Tables for redressing wrongful damage to property (D. 9, 2, 1), although there is some doubt as to the exact terms. Subsequent laws seem to have been made, but they were all abrogated by the *lex Aquilia* upon which, henceforth, the law of wrongs to property depends. It was a *plebiscitum* carried by Aquilius, a tribune of the Plebs (B.C. 286).

In its terms the Aquilian Law did not apply to injuries to freemen; but, by a Praetorian extension, was made also to embrace that class of wrongs. It applied also to immovables, as will be afterwards noticed; but in the main it was confined to damage to moveable property, whether slaves, animals, or inanimate things.

The subject will be considered under the following heads:—

α. The constituent elements of wrongful harm (*damnum injuria*).

1. The acts or defaults that constitute *damnum injuria*.
2. The damage must be susceptible of estimation in money.
3. It must be caused wilfully or negligently. Contributory negligence.
4. When damage is caused in protecting one's own property.

β. What persons (besides owners) may sue for wrongful harm?

α. The constituent elements of wrongful harm.

1. The acts or defaults that constitute wrongful harm.

The *actio damni injuriae* is established by the *lex Aquilia*. The first chapter provides that if any one wrongfully (*injuria*) kills man or four-footed beast reckoned among cattle belonging to another, he shall be condemned to pay to the owner the highest value that property bore within the year preceding. (J. 4, 3, pr.; G. 3, 210.)

And the aim of the statute in providing not absolutely for four-footed beasts, but only for those that are reckoned among cattle (*pecudes*), is this:—it would have us know that the provision does not apply to wild beasts or to dogs, but only to those animals that can properly be said to graze (*pasci*)—horses, for instance, mules, asses, oxen, sheep, she-goats. Swine, too, it is held, are included, for they come within the term cattle, seeing they too graze in flocks. And so Homer says in the

Odyssey, in a passage cited by Aelius Marcianus in his Institutes—"Him you will find sitting near his swine; and they are grazing (*véμονται*) near the rock Korax, hard by the spring Arethusa." (J. 4, 3, 1.)

Elephants and camels, because beasts of burden, are included in this chapter. (D. 9, 2, 2.)

The second chapter of the *lex Aquilia* is not in use. (J. 4, 3, 12.)

This chapter referred to *adstipulatio*. (See Book II., Div. I., Accessory Contracts.)

The third provides for every other kind of damage. Therefore if a man wounds a slave, or a four-footed beast reckoned among cattle, or wounds or kills a four-footed beast not reckoned among cattle, as a dog or a wild beast, this chapter establishes an action to be brought against him. And wrongful damage (*damnum injuria datum*) to all other animals, and also to anything without life, gives rise to a claim under this part of the statute. For if anything is burned or smashed (*ruptum*) or broken, an action is established by this chapter. The one term *ruptum* might indeed suffice for all those grounds of action, for it means spoiled (*corruptum*) in any way. And therefore not only burning and breaking, but cutting too, and crushing and spilling and destroying, or making worse in any way, are included under this term. Nay, an opinion has been given that if a man puts anything into another's wine or oil to spoil its natural goodness, he is liable under this part of the statute. (J. 4, 3, 13; G. 3, 217.)

According to the interpretation of this law, only those injuries were understood as included that were caused by the body to the body (*corpore corpori*). But this narrowness was removed by the Praetor.

But it has been held that under this statute there is an action only if the man does the damage directly with his own body. And therefore against him that does damage in some other way *utiles actiones* are usually given. If, for instance, a man shuts up another man's slave or cattle so as to starve them to death, or drives a beast so furiously as to founder it, or terrifies cattle into rushing over a cliff, or persuades another's slave to climb a tree or go down a well, and he in climbing or going down is either killed or injured in some part of his body, then a *utilis actio* against him is given. But if a man thrusts another's slave from a bridge or from the bank into a river, and the slave is drowned, then, from the very fact that he threw him in, it is easily seen that it was with his body he did the damage, and therefore he is liable under the *lex Aquilia*. But if it is not with the body that the damage is done, and no one's body is injured, but in some other way damage has befallen some one, then as the *actio Aquilia* is not enough, whether direct or *utilis*, it is held that the guilty person is liable to an *actio in factum*. For instance, if a man, moved by pity, frees another's slave from his fetters in order that he may run away. (J. 4, 3, 16; G. 3, 219.)

The line drawn by Justinian is difficult to reconcile with the cases given in the Digest.

Illustrations.

A pours B's corn into the river and destroys it. This case is covered by the terms of the statute. (D. 9, 2, 27, 19.)

A strikes B's money out of his hand, and it falls into a river and is lost. In this case there lies an *actio in factum*. (D. 9, 2, 27, 21.)

A gives B's oats to his own horse, or drinks B's wine.* As no damage was done to the oats or wine, the injury is indirect. *Utilis actio*. (D. 9, 2, 30, 2.)

A midwife gives her patient poison by pouring it down her throat. This is a direct injury under the statute. (D. 9, 2, 9.) But if she merely gave it to the patient, who drank it herself, it is indirect, and there lies an *actio in factum*. (D. 9, 2, 7, 6.)

A lights a fire, which it is B's duty to watch. B falls asleep, and in consequence the house is burnt. It may be said B did nothing, and A did no wrong. The injury being indirect, there lies against B the *utilis actio*. (D. 9, 2, 27, 9.)

A smoked B's bees, and drove them away or killed them. Ulpian says, as A did not kill them, but merely created the means of their death, the remedy is not by the direct action, but by an *actio in factum*. (D. 9, 2, 49, pr.) This decision disagrees also with the distinction made by Justinian in the text, for the harm is done to the bodies of the bees.

A held a slave while B killed him. B committed a direct injury, A only contributed to it indirectly. Against A lies an *actio in factum*. (D. 9, 2, 11, 1.)

A scares a horse on which the slave of B is riding, and the slave is thrown off into a river and drowned. Against A lies an *actio in factum*. (D. 9, 2, 9, 3.)

A cuts a rope by which a boat is moored; the boat drifts and is lost. Against A lies an *actio in factum*. (D. 9, 2, 29, 5.)

A drives his cattle into B's field without B's authority, and allows them to eat the grass. Against A lies an *actio in factum*. (C. 3, 35, 6.)

A sets on a dog that bites B. If A held the dog and set him on, the injury is direct; but if he did not hold the dog, the action is *in factum*. (D. 9, 2, 11, 5.)

2. The damage must be capable of being measured in money in order to support an action on the *lex Aquilia*. But when the damage cannot be so estimated, recourse may sometimes be had to the remedy for *injuria*. Thus, if a blow or injury to a slave does not depreciate his value in the market, it is not *damnum*; it may, however, be *injuria*. If the slave requires medical attendance, then he is considered as receiving *damnum*. (D. 9, 2, 27, 17.) It may, indeed, happen that some injuries (as castration) enhance the pecuniary value of a slave; and in that case the remedy of the master is to sue for the wrong to the person (*injuria*). (D. 9, 2, 27, 28.)

3. The right that an owner has against men generally is not that the usefulness of his moveables shall not be impaired by any act of theirs; that would be putting it too wide, for men are not responsible for accident; but his right is that they shall not, by their malice or negligence, impair the usefulness of his property. This delict is accordingly wider than *injuria*. There can be no *injuria* without intention; *damnum injuria* may result from carelessness only. Hence a noticeable difference. A mistake as to the character of the person insulted or assaulted sometimes removed the attack from the category of *injuria*. But if a man kills a slave under the belief that he is a freeman,

he does not escape paying damages to the owner of the slave for his loss. (D. 9, 2, 45, 2.)

He kills wrongfully (*injuria*) to whose malice (*dolus*) or negligence death is due ; nor is there any other statute to punish damage done otherwise than wrongfully. And therefore he goes unpunished that without negligence or wilful wrong does damage by some accident. (G. 3, 211.)

And he that kills by accident is not liable under this statute, if only no negligence is shown on his part. For otherwise, under this statute, a man is liable for negligence quite as much as for malice. (J. 4, 3, 3.)

Illustrations.

Therefore, if a man is playing with javelins, or practising, and pierces your slave as he is passing, a distinction is made. For, if the man is a soldier and in the Campus Martius, or any other place where men usually train, the act does not imply negligence on his part ; but if any one else does such a deed, then he is chargeable with negligence. And the same rule of law applies to the soldier too if he does the deed in any other place than that set apart for soldiers to practise in. (J. 4, 3, 4.)

And again, if a pruner, by breaking down a branch from a tree, kills your slave as he passes, then if this is done near a public road or one used by the neighbours, and he did not first shout out so that an accident might be avoided, he is chargeable with negligence. But if he did first shout out and the slave did not care to take heed, the pruner is free from blame. And so too if he happened to be cutting at a place quite off the road or in the middle of a field, although he did not first shout out ; because there no outsider had any right to go to and fro. (J. 4, 3, 5.)

And further, if a doctor, after operating on your slave, fails to see to the healing of the wound, and therefore the slave dies, he is chargeable with negligence. (J. 4, 3, 6.)

Want of skill, too, is reckoned as negligence ; if, for instance, the doctor kills your slave by bad surgery or by giving him wrong drugs. (J. 4, 3, 7.)

And if mules that the driver from want of skill cannot hold in run over your slave, the driver is chargeable with negligence. And even if it was from want of strength that he could not hold them in, though another stronger man could have, he is liable for negligence all the same. And the same decisions apply to the rider that cannot keep in his horse, whether from want of strength or from want of skill. (J. 4, 3, 8.)

A sets his stubble or thorns on fire, and the flames are carried so far as to burn B's corn or vines. Is A responsible ? It depends on the circumstances of the case. If it was a windy day, and A did not take precaution against the fire spreading, or if he has not watched it, he is liable. But if he took all reasonable care, and a sudden gust of wind carried the flames, he is not. (D. 9, 2, 30, 3.)

They that place traps to catch animals in roads or pathways are responsible for all damage ; but not if the traps are in places usually chosen for the purpose. (D. 9, 2, 28.) If, however, a person that has no right to place traps does so, and cattle grazing on the adjoining land have been caught in them, the person that set the traps is responsible. (D. 9, 2, 29.)

CONTRIBUTORY NEGLIGENCE.—Even a person negligently causing an injury is relieved from blame if the damage is accomplished only by the concurrent negligence of the sufferer. Hence there was no remedy when the sufferer had the power to escape from the danger, and did not exert himself to do so. He could only claim compensation when he, either did not foresee the injury, or could not have helped himself if he had foreseen it. (D. 9, 2, 28, 1.)

4. In certain cases, when a man was so situated that he could not help inflicting some injury upon another's property in order to avoid a greater to his own, he was allowed with impunity to do that injury.

Illustrations.

A house might be pulled down to prevent the spread of flames from a fire; and even, if the precaution proved to be unnecessary, the owner of the house had no redress, unless it had been pulled down in an irrational panic, and not from a reasonable view of the danger. (D. 9, 2, 49, 1.)

A ship is driven in a storm among the ropes anchoring another vessel, and it cannot be extricated except by cutting the ropes. The owner of the vessel in danger has a right to cut the ropes, and does not subject himself to any action for damages. The same rule applied when a vessel without any fault had got entangled among fishermen's nets. It could cut its way out. (D. 9, 2, 29, 3.)

β. What persons (besides owners) may sue for wrongful harm?

As in the case of *furtum*, the delict of *damnum injuria* might be committed against any one having a right *in rem* to a thing, although not owner (*dominus*). Under the Aquilian Law, indeed, this was not so; the only person that had a remedy under that enactment was the owner. But just as the Praetor gave a remedy for indirect as well as direct damage, so he provided a remedy to persons having an interest in the usefulness of the property, although their interest fell short of full ownership.

1. The *bona fide* possessor had, Ulpian tells us, an *actio in factum* against all that did harm to his moveable property, even, if it was the owner himself. (D. 9, 2, 17.)

2. The *fructuarius* and *usuarius* also had a remedy (*utile judicium*) after the analogy of the Aquilian Law (*ad exemplum legis Aquiliae*), even against the owner. (D. 9, 2, 11, 10; D. 9, 2, 12.) Hence if the owner has killed a slave that he had given in usufruct to another, he must give compensation.

3. To one having a servitude.

A has an aqueduct over B's land, and it is pulled down by C. According to a rule hereafter to be more fully explained, the aqueduct, being attached to B's land, belonged in law to B. A, however, can bring an action (*actio utilis*) against C for the damage. (D. 9, 2, 27, 32.)

4. Secured creditor. The right of a creditor to the thing pledged may be as effectually impaired by injuring the thing as by stealing it. He has, therefore, the same action as a *bona fide* possessor, even against the owner. (D. 9, 2, 17.) He may sue for the amount of his interest in the debt, and the owner may sue for the balance, if any. (D. 9, 2, 30, 1.)

5. Borrower. The borrower of clothes destroyed while in his custody by another has no remedy. The action must be brought by the owner (*dominus*). (D. 9, 2, 11, 9.)

B. Duties of the owner of animals (*res se moventes*).

I. *Pauperies*.

On account of irrational animals that from wantonness or heat or their savage nature have done damage (*pauperies*), a *noxalis actio* is set forth in the statute of the XII Tables. (But if those animals are given up in satisfaction of the wrong, then the defendant is free, for so the statute expressly provides.) Suppose, for instance, that a kicking horse or an ox in the habit of goring has kicked or gored a man, then this action lies. But it applies to those animals only that are stirred up contrary to the nature of their kind; for if they are wild beasts by blood, the action is void. If, therefore, a bear escapes from his owner and then does harm, his former owner cannot be sued; for he ceased to be owner when the wild beast escaped. *Pauperies* is damage done without *injuria* on the doer's part. For indeed no animal can be said to do an *injuria*, seeing it lacks sense. So much for the *noxalis actio*. (J. 4, 9, pr.)

The XII Tables gave an action if a quadruped had done harm. (*Si quadrupes pauperiem fecisse dicetur*.) (D. 9, 1, 1, pr.) If any other animal than a quadruped did the injury, an action was also provided by the Praetor (*utilis actio*). (D. 9, 1, 4.) This rule applies only to tame animals, not to wild, for the reason stated in the text. The analogy with *noxa* is kept up. *Noxia* is when a slave does that which in a freeman would be wrong; *pauperies* is the damage done by an animal contrary to its usual nature, and therefore bearing a kind of resemblance to wrongs. If a tiger destroys a human being, it but acts according to its nature; but when an ox gores, the act may be regarded as a breach of the good behaviour that is its second nature. In another point, the same analogy was preserved. The responsibility for the mischief followed the animal, and

fell upon the person to whom for the time it belonged (*noxæ caput sequitur*). (D. 9, 1, 1, 12.)

No action lay if the animal were irritated or roused by another. (Paul, Sent. 1, 15, 3.) Thus when a horse was struck by a *dolo* or a spur, and reared and kicked a person, it did not commit *pauperies*. The injury was not the result of an outbreak of unusual badness, but was due to the mismanagement of the horseman; and therefore the owner of the horse is not responsible, but only the person that irritated the horse. So if the fault is with the driver, or the mischief results from the beast being overloaded, or from the nature of the place where it happens, no responsibility attaches to the owner, but compensation may be demanded from the person in the wrong. (D. 9, 1, 1, 4.)

II. Edict of the *Ædile* in regard to animals that do not fall under the head of *pauperies*.

It must be borne in mind, too, that an edict by the *Ædiles* forbids us to keep a dog, a boar, a bear, or a lion, where there is a road in common use. And if despite this we do so, and a freeman suffers hurt, the owner will be condemned to pay such a sum as the judge shall think fair and right; while for all other damage the owner must pay double the loss. And beside these actions allowed by the *Ædiles*, the *actio de pauperie* too will stand. For when several actions, especially if penal, bearing on the same matter, meet, recourse to one never does away with another. (J. 4, 9, 4.)

Justinian omits the penalty of 20 *solidi* for killing a freeman.

When a dog is chained in a house, and some one stumbling on it accidentally is bitten, the owner is not liable (D. 9, 1, 2, 1); but if the owner takes it into a place where he ought not, or by not keeping it sufficiently in hand allows it to slip, he is responsible for his negligence and must pay all the damage; nor does he escape by the surrender of the dog. (D. 9, 1, 1, 5.)

Second, RIGHTS TO IMMOVEABLES.

A. Rights of owner against all men generally.

(A.) Deprivation of simple possession.

I. By Fraud. Removing landmarks (*de termino moto*).

An immoveable, from its nature, cannot be stolen. Theft, therefore, has no application to land. There is, however, an analogous offence—removing the landmarks, and stealing land by inches. We are told by Dicynsius Halicarnassus (*Antiq. Rom.* 2, 75) that Numa made a law on the subject. Although

Numa may be regarded as a myth, there can be no doubt that as soon as private property in land was recognised, the offence of removing landmarks had to be provided for. Numa, we are told, ordered every man to mark the boundary of his land, and to set up stones, which were made sacred to *Jupiter Terminalis*, and that, once a-year, on a day appointed, the people should assemble and offer up sacrifices of grain and fruits at the boundaries. This is the mythical origin of the feast of the *Terminalia*. If any one dared to remove or shift a landmark, he was devoted to the god that watched boundaries, and could be killed by any one with impunity. The same sanction was extended to the *Ager Romanus*, and the same punishment denounced against those that took from it to increase their *ager privatus*.

The Agrarian law passed by Caius Caesar established a fine of 50 *aurei* for every landmark thrown down or shifted, and allowed any one to bring the action. (D. 47, 21, 3, pr.) Nerva allowed a master to pay the fine, if his slave had removed a landmark without his knowledge; and if the master refused, the slave was condemned to death. (D. 47, 21, 3, 1.) Hadrian made the offence a crime. (D. 47, 21, 2.)

II. By Force. (*Interdict de vi et vi armata*.)

As there could be no theft of an immoveable, so there could be no robbery of it. Still an owner might be ejected from his lands by force, and this constituted an infraction of his rights, for which a remedy was provided, not by the usual method of actions, but by interdict. (D. 43, 16, 3, 15.)

1. The ejectment of any person from an immoveable by force, with or without weapons, was a wrong remediable by interdict. The essential characteristic of it was, however, that it was available for a mere possessor, whether he was owner (*dominus*) or not. But it may be regarded as part of the legal protection of owners, for of course an owner out of possession could not be dispossessed by violence or in any other way.

2. A distinction was drawn between force with weapons (*vis armata*) and force without weapons (*vis cotidiana*). The most important distinction between the two forms of force was this: any possessor, however unjust his possession, was entitled to protection against armed violence; but a person that had acquired possession by fraud or force, or was a mere tenant-at-will of the ejector, had no redress if he were dispossessed by force without weapons. (D. 43, 16, 14.)

An interdict for recovering possession is usually given when a man has been ejected by force from the possession of a farm or a house. He has then given him the interdict *Unde vi* [which commences, *Unde tu illum vi deieciisti*]. (J. 4, 15, 6; G. 4, 154.)

By it the ejector is compelled to restore possession, if only the ejected did not get possession from his opponent by force, by stealth, or by leave (*nec vi nec clam nec precario*). But if he did, he can be ejected with impunity. (G. 4, 154.)

Sometimes, however, the Praetor will compel me, when I have ejected a man that got possession from me by force, by stealth, or by leave, to restore possession,—as, for instance, when I have ejected him with arms. For this the Praetor has a special interdict, ordaining restitution in every case. (G. 4, 155.)

Thus a person forcibly dispossessed could resort to simple force, without weapons, to recover possession. This did not, however, interfere with the right of self-defence. An armed attack could be repelled by arms; and even if, in the vicissitudes of the conflict, the possessors should be turned off their own land, they still had a right to use arms, if possible, to get back. The whole fight must, however, be a single transaction; if, being turned out, the owner retired, and after recruiting his forces renewed the conflict, he would not be justified (*non ex intervallo sed ex continenti*). (D. 43, 16, 3, 9.)

But in the time of Justinian this distinction was no longer regarded.

By the interdict *Unde vi* the ejector is compelled to restore possession, even although the ejected got possession from him by force, by stealth, or by leave. But under our sacred constitutions, as we have said above (pp. 96, 97), if any man seizes on a thing by force, then if it is part of his goods he is deprived of its ownership; if it belongs to another, he is compelled first to restore and then to pay its value to the victim of his force. And further, he that ejects any one from possession by force is liable under the *lex Julia de vi* for employing force, either private or public. Force is private if no arms are used; but if arms are used to drive a man out of possession, then the force is public. And by the name arms is to be understood not only shields and swords and helmets, but also clubs and stones. (J. 4, 15, 6.)

If there are several ejectors, and only one has a rod or sword, it gives the character of armed violence to the attack. (D. 43, 16, 3, 3.) Even if they came unarmed, but took them up in the fight (D. 43, 16, 3, 4), or brought arms and refrained from using them, it was armed force. (D. 43, 16, 3, 5.) It was essential, however, that possession should be gained by the exercise of force, and not by mere threats. (D. 43, 16, 3, 7.)

(B.) Rights to the enjoyment and use of an immoveable.

I. Secretly cutting down trees (*arborum furtim caesarum*) (D. 47, 7) was a special offence created by the XII Tables, but scarcely distinguishable from theft. When anything attached to an immoveable was removed, it was at once regarded as a moveable, and the person that took it as a thief. If the person that cut or destroyed a tree had no intention to steal, but had a simple desire for mischief, then he was responsible by the

XII Tables for *damnum injuria*. Now, as in cutting a tree a person could be actuated only by one of those two motives, either stealing or mischief, there would seem to be no necessity for creating the special offence *arborum furtim caesarum*. The penalty fixed by the XII Tables was changed by the Praetor into a penalty of double the value of the trees. (D. 47, 7, 7, 7.)

II. Secretly or forcibly interfering with an owner in the use of his land. (Interdict *quod vi aut clam*.)¹

1°. What acts constituted a wrong remediable by this interdict? The interdict *quod vi aut clam* applied only to immovables, and provided generally for most injurious acts done thereto. (D. 43, 24, 20, 4.)

Illustrations.

A pours something down B's well, and spoils the water. (D. 43, 24, 11.)

A has pushed B's vines on to his (A's) own land, and they have taken root, so that B has lost the right to remove them. (D. 43, 24, 22.)

A carries away the stakes supporting B's vines. (D. 43, 24, 2, 3.)

A pulls down B's house. (D. 43, 24, 7, 9.)

A carries away B's tiles lying ready to be placed on his house; this is theft. (D. 43, 24, 9, pr.) If, however, the tiles are on the house (D. 43, 24, 7, 10), whether actually fixed to the roof or simply lying thereon (D. 43, 24, 8), it is not theft, but a wrong remediable by the interdict.

A lops the branches of B's trees. (D. 43, 24, 9, pr.)

A removes from B's land or house any fixture (*aliquid aedibus adfixum*). (D. 43, 24, 9, 2.) This does not include keys, door-bars not fixed to the door, lattices or windows not fixtures. (D. 43, 24, 9, 1.)

A goes upon B's farm and scatters the dung from his dung-heap. If A scattered it over fields already manured, and which might be injured from the excess (D. 43, 24, 7, 6), it was a violation of B's right to his immovable; but if he threw it beyond the arm, it was not within the interdict. (D. 43, 24, 9, 3.)

A ploughs B's meadow, or digs a ditch in his land. (D. 43, 24, 9, 3; D. 43, 24, 22.) But this was not an offence when done by a tenant in due course of cultivation, even against the wishes of the owner, unless harm was done by it. (D. 43, 24, 7, 7.)

A lops pollards (*silva caedua*) belonging to B. If they are unripe, it is an offence (D. 43, 24, 18, pr.); if mature, no harm is done to the owner, and there is no offence, unless A intends to carry them off for his own use; in which case he commits theft.

2°. To constitute a wrong, the injurious acts must be done by force or secretly; that is, as interpreted by the jurists, against the will or without the consent of the owner.

Ulpian says the definition of Quintus Mucius Scaevola satisfied him. A person

¹ *At Praetor: Quod vi aut clam actum est, qua de re agitur, id quum experiendi potestas est, restituas.* (D. 43, 24, 1.)

does anything by force (*vi*) when he does what he is forbidden to do by the owner. (D. 43, 24, 1, 5; D. 50, 17, 73, 2.)

Three definitions are given in the Digest of secret damage.

A person does a thing secretly (*clam*) when he does that which he knows to be disputed, or likely to be made the subject of dispute (Quintus Mucius Scaevola, D. 50, 17, 73, 2); or when he does something without the knowledge of his adversary, and has not informed him of it, provided he either expected, or might reasonably expect, a dispute with him (D. 43, 24, 3, 7, Cassius); or when he conceals an act from a person that he knows would forbid it, and either thinks, or has reason to think, that it would be forbidden. (D. 43, 24, 3, 8, Aristo.)

As in the case of theft, the remedy here described may be resorted to by any one having an interest in the immoveable, even against the owner. (*Non solum domino praedii sed etiam his quorum interest opus non factum esse.*) (D. 43, 24, 11, 14.) Hence to the usufructuary. (D. 43, 24, 12.)

III. In certain cases the interdict *uti possidetis*, although having essentially a different scope (see *Possessio*, Appendix to *Dominium*), was admissible as a remedy for injurious acts done to land.

To prohibit a man from building on his own ground was in a sense robbing him of possession. (D. 43, 17, 3, 2; D. 41, 2, 52, 1.) So when a tenant (*inquilinus*) refuses to allow the owner to enter and repair. (D. 43, 17, 3, 3.) When a neighbour places his rafters partly on my wall and partly on his own, he may be compelled to take them off by the interdict *uti possidetis*. (D. 43, 17, 3, 9; D. 43, 17, 3, 4.)

IV. Damage. *Damnum injuria*.

The action founded on the Aquilian law, which has been explained in its application to moveables, was also available for similar damage done to immoveables, as setting a house or vineyard on fire (D. 9, 2, 27, 7), or pulling down a house. (D. 9, 2, 27, 31; C. 3, 35, 2.)

B. Rights of owners of conterminous immoveables.

I. "The Praetor says, when a tree from your house hangs over his house, seeing it is your own fault that you do not take it away, I forbid the use of force to hinder him then from freely taking it away and keeping it himself" (D. 43, 27, 1.)¹

When a tree growing upon A's land overhangs the field or building of B, if A does not cut it down, he must suffer B to do so. In the case of a house, the rule is subject to no

¹ *Ait Praetor: Quae arbor ex aedibus tuis in aedes illius impendat, per te stat quominus eam adimas, tunc quominus illi eam arborem adimere sibi que habere liceat, vim fieri veto.*

qualification, but in the case of a field it applies only when the tree is under 15 feet in height. The earliest law was in the XII Tables, and the object was to prevent fields being injured by the shade thrown from low trees. (D. 43, 27, 1, 9.)

II. A right to gather fruits falling on another's land (*de glande legenda*).

"The Praetor says, when acorns from his land fall on yours, I forbid you to use force to hinder him from freely picking them up and carrying them away every third day."¹ (D. 43, 28, 1.)

The word acorn (*glans*) used in the interdict covers all fruits. (D. 50, 16, 236.)¹

III. Protection from flooding by rain water (*aquae pluviae arcendae*. D. 39, 3.)

In the absence of a servitude no owner had a right to the rainfall from the lands of an adjoining proprietor. Every owner had a right to the water that fell on his own land (D. 39, 3, 1, 11), and to keep it back, even although he had been accustomed to let it pass on to his neighbour. (D. 39, 3, 21.) So when a man by digging on his own land dried up his neighbour's well, his conduct was not actionable. (D. 39, 3, 1, 12.)

But every landowner had a right to prevent any change in his neighbour's land by which rainwater not hitherto running on to his land was made to pass on to it. (D. 39, 3, 1, 2; D. 39, 3, 1, 22; D. 39, 3, 1, 14.) There was no remedy against the overflow of water from thermal springs (D. 39, 3, 3, 1), nor when buildings were injured, for the action was given for the protection of fields. (D. 39, 3, 1, 17.)

But an owner had a right to alter the state of his land, so as to throw rainwater on his neighbour when it was required for the purpose of cultivation. (D. 39, 3, 1, 15.) Thus, he could make any works for the purpose of reaping the fruits of his land (D. 39, 3, 1, 7), including under that designation the whole produce of land, such as chalk or stones, as well as grapes or corn. (D. 50, 16, 77.)

Ditches made for the purpose of drying the land were also in the exception (D. 33, 3, 1, 4); not, however, to let the water run on to his neighbour, but to sink into the ground; for, says Ulpian, no one has a right to improve his land by making his

¹ *Ait Praetor: "Glandem quae ex illius agro in tuum cadat, quominus illi tertio quoque die legere, auferre liceat, vim fieri veto."*

neighbour's worse. If the owner of the land that suffers from the incursion of rainwater has given his consent to the operation that has caused the mischief, he has no remedy. (D. 39, 3, 19.) Nor is there any remedy when the construction of the works was authorised by the State (D. 39, 3, 2, 3), or had existed from beyond the memory of persons alive. (D. 22, 3, 28 ; D. 39, 3, 2, 3.)

INVESTITIVE, DIVESTITIVE, AND TRANSVESTITIVE FACTS.

Having examined the rights and liabilities of an owner, we have now to inquire into the ways in which these rights may be acquired, transferred, or extinguished. Throughout this part of the exposition it is convenient to assume that the investitive or divestitive facts operate without restriction, and afterwards to point out the restrictions to which they are subject. The following is the arrangement :—

INVESTITIVE FACT.—*Occupatio*.

DIVESTITIVE FACT.—*Derelictio*.

TRANSVESTITIVE FACTS.

A. Facts belonging to the ancient law (*ex jure civili*).

I. *Mancipatio*.

II. *Cessio in jure*.

III. *Usucapio*.

B. Facts belonging to the law as expanded and settled in the time of Justinian (*ex jure gentium*).

I. *Accessio*.

II. *Traditio*.

III. *Prescriptio*.

RESTRAINTS ON INVESTITIVE AND TRANSVESTITIVE FACTS.

A. Persons that cannot be owners.

I. Slaves. The *Peculium* of slaves.

II. Persons subject to the *patria potestas*. *Peculium castrense*, &c.

III. Wives subject to *manus*. *Dos*, *Parapherna*, *Donatio propter nuptias*.

B. Things that cannot be owned.

I. *Res communes*.

II. *Res publicae*. (*Publicae Viae* ; *Publica flumina*.)

III. *Res universitatis*.

IV. *Res divini juris* ; *sacrae*, *sanctae*, *religiosae*.

C. Restraints on conveyance without valuable consideration. (*Donatio*.)

EXTENSION OF INVESTITIVE AND TRANSVESTITIVE FACTS—AGENCY.

INVESTITIVE FACT.

I. *Occupatio* is the taking possession of what belongs to nobody (*res nullius*) with the intention of keeping it as one's property.

The phrase "thing belonging to no one" (*res nullius*) is used in two very different senses. Thus we are told that—

Things sacred, devoted, and hallowed belong to no one. For what is Heaven's by right is included in no one's goods. (J. 2, 1, 7.)

In a sense, what Justinian here states is perfectly true. Things consecrated to the Church are not private property; they do not belong to any specified individuals. But they are the objects of rights closely resembling ownership, and should not be classed with things that usually are objects of private property, but which for a time may happen to have no owner. The phrase "a thing belonging to nobody" should be restricted to things capable by appropriation of becoming the objects of private property. If the terms employed in the Institutes were correct, the maxim of Roman Law, that what belongs to no one (*res nullius*) becomes the property of the first one that takes possession of it, would no longer be true.¹

Occupatio, as a mode of acquisition, existed in the following cases :—

1. LIVING THINGS.—All creatures untamed that live in the air, on the earth, or in the water, become the property of the person that first takes or catches them. (D. 41, 1, 1, 1.)

And by natural reason we acquire not only what becomes ours by delivery, but also what we have made ours by *occupatio*. For previously such things belonged to no one; as, for instance, all that we take by land, by sea, or in the air. (G. 2, 66.)

Wild beasts, therefore, and birds and fishes—all animals, that is, that are born on sea or land or in the air—as soon as any one takes them, become at once his property by the *Jus Gentium*. For what formerly belonged to no one, is by natural reason given up to him that takes possession (*occupanti*). And it makes no difference whether one takes the wild beasts and birds on his own lands or on another's. Clearly, however, he that enters on another's land to hunt or to snare birds may be forbidden to enter by the owner, if seen in time. (J. 2, 1, 12.)

Therefore all you take [a wild beast, a bird, or a fish, the moment it is taken, becomes yours, and] is understood to be yours so long as you guard it and keep it in. But if it escapes your guard and regains its natural freedom it ceases to be yours, and becomes again the property of him that first seizes it. And its natural freedom is understood to be regained when it has either escaped from your sight, or, though it is still in view, is very hard to follow up. (J. 2, 1, 12; G. 2, 67.)

The question has been raised whether, if a wild beast be so wounded that it can be taken, it is to be understood at once to be yours. Some have decided that it is yours at once, and continues to be yours so long as you follow it up; but that if you leave off following it up it ceases to be yours, and again becomes the property of him that first seizes it. Others think that it is yours only if you take it. And it is this latter opinion that we confirm; because many accidents often happen to hinder you from taking it. (J. 2, 1, 13.)

¹ *Quod enim nullius est, id ratione naturali occupanti conceditur.* (D. 41, 1, 3.)

In the case of animals that habitually go away and come back again [pigeons, for instance, and bees, and hinds, that habitually go to the woods and come back again], the rule that is [handed down] approved is this,—that they are understood to be yours so long as they intend to return. For if they cease to intend to return they cease to be yours, and become the property of those that first seize them. And it is considered that they cease to intend to return when they cease from the habit of returning. (J. 2, 1, 15 ; G. 2, 68.)

Bees, too, are by nature wild. Therefore those that settle on your tree, before you hive them, are no more yours than birds that build their nest there. And so if any one else hives them he will be their owner. And the combs too, if they have made any, may be taken away by any one. But, of course, while they are still untouched, if you see in time any one entering your lands, you can lawfully stop him from entering. A swarm, again, that has flown away from your hive, is understood to be yours so long as it is in view, and is not hard to follow up. Otherwise it becomes the property of him that first seizes it. (J. 2, 1, 14.)

Peacocks and pigeons also are wild by nature ; and it does not matter that they are in the habit of flying away and flying back again—for bees too do the same ; and it is agreed that they are naturally wild. Deer, too, some people have so tame that they are in the habit of going to the woods and coming back again ; and yet that they are naturally wild no one denies. (J. 2, 1, 15.)

Fowls and geese are not wild by nature ; and that we can understand from the very fact that there are other kinds of fowls and geese expressly called wild. And, therefore, if your geese or fowls are by an accident panic-struck and fly away ; even though they have escaped your view, wherever they may be, they are understood to be yours. And the man that, with an intention to make a gain of it, keeps those animals, is understood to be guilty of theft. (J. 2, 1, 16.)

2. PRECIOUS STONES in a state of nature. .

Pebbles, precious stones, and the like, found on the sea-shore, become at once by the *jus naturale* the property of the finder. (J. 2, 1, 18.)

An island that springs up in the sea (this happens at times, though rarely) belongs to the (first) occupier, for it is believed to be no one's. (J. 2, 1, 22.)

3. TREASURE-TROVE (*Thesaurus*).

Treasure-trove is treasure deposited in a place for so long a time that no one can tell who is the owner of it.¹ When treasure has been hid in the earth for safety, it is not treasure-trove, unless it is so ancient that the owner of it is unknown.

Illustration.

A person bought a house, and sent a workman to repair it. The workman found money hidden. If it were money that the previous owner could identify as his—as having been lost or left by mistake—it must be restored to him. (D. 6, 1, 67.)

¹ *Thesaurus est vetus quaedam depositio pecuniae, cujus non extat memoria, ut jam dominum non habeat.* (D. 41, 1, 31, 1.)

Treasures that one finds in ground of his own, the late Emperor Hadrian, following what naturally seems fair, gave up to the finder. And his decree was the same with regard to things found by chance in a place that is sacred or devoted. If, again, a man finds treasure in another's ground when not engaged in searching for it, but by chance, he must give up half to the owner of the soil. And similarly, if a man finds treasure in ground belonging to the Emperor, half goes to the finder, and half, as Hadrian decreed, belongs to the Emperor. And again, similarly, if a man finds treasure in ground that belongs to a city, or to the *fiscus*, half belongs to himself, and half to the *fiscus* or city. (J. 2, 1, 39.)

4. Things were *res nullius* if their owners had relinquished possession of them with the intention of abandoning the ownership.

5. The property of an enemy captured in war was said to belong to nobody, and therefore to become the property of the captors by the right of occupation.

All that is taken from the enemy becomes ours by natural reason. (G. 2, 69.) And again, all that we take from the enemy at once becomes ours by the *Jus Gentium*. So far does this rule extend that even freemen, if taken, are reduced into slavery to us. And yet they, if they escape from our power and return to their own people, regain their former status. (J. 2, 1, 17.)

Immoveables taken by the Romans from an enemy were not treated as *res nullius*; for they were not left as prize to the actual captors, but were reserved for the State. When an enemy had driven the Romans out, but was afterwards expelled, the lands were restored to their former owners, and were not appropriated by the State. (D. 49, 15, 20, 1.)

Moveables belonged to the individual captors, subject to the rules of prize. If they were the spoil of a common movement, they must be divided according to the rules of war; but when they were captured by the enterprise of the individual soldier, he was not obliged to share them with his neighbours. This seems to be the reconciliation of the apparently conflicting passages. (D. 49, 14, 31; D. 41, 1, 51, 1.)

DIVESTITIVE FACT.

I. Dereliction.

And on this principle it seems quite true to say also, that if a thing is regarded by its owner as abandoned, then any one that takes possession forthwith becomes its owner. And it is regarded as abandoned when its owner has thrown it away with the intention that it shall no longer be part of his property; he ceases, therefore, at once to be the owner. (J. 2, 1, 47.)

But the case is quite different if goods are thrown overboard in a storm, in

order to lighten the ship; for they still belong to their owners. For it is manifest that they are thrown overboard not with any intention not to keep them, but in order that both owner and ship may the better escape the dangers of the sea. And therefore, if when they are cast ashore by the waves, or are still floating about at sea, any one takes possession and carries them off with an intention to make gain out of them, he commits a theft.

And a closely-allied case is that of things that fall from a carriage in motion without the owner's knowledge. (J. 2, 1, 48.)

Could a slave be a derelict? Or did a slave abandoned by his master become free? In certain cases where a sick slave was abandoned he acquired his freedom. But apparently a slave might be treated as derelict.

Illustration.

Sempronius claimed Thetis as his slave, on the ground that Thetis was the child of his female slave. In defence it was proved that in a previous action brought by the nurse of Thetis against another person for the maintenance of the child, the nurse had been told to sue Lucius Titius, the father of the child. Lucius Titius, having paid the money demanded by the nurse, manumitted Thetis before the President of the province. Was this valid? Paul answered, that as Sempronius seemed to have treated Thetis, the child of the female slave, as a derelict, the manumission by Lucius Titius was perfectly valid, inasmuch as he had acquired the ownership of Thetis by *occupatio*. (D. 41, 7, 8.)

TRANSVESTITIVE FACTS.

The modes of conveyance in the Roman Law fall into two groups, which are distinguished from each other, according to the view of some, by their origin; some descending from the civil law (*ex jure civili*), others from the *Jus Gentium*. But "delivery" (*traditio*), which forms the characteristic mode of conveyance of the *Jus Gentium*, had a place, although a very restricted one, in the oldest law of Rome. The older modes of conveyance may be called formal, as contrasted with the later and non-formal.

A. FORMAL CONVEYANCES (*Ex jure civili*).

I. MANCIPATION (*Mancipatio*).

Res Mancipi are transferred to another by *mancipatio*; and for this reason, indeed, are called *res Mancipi*. And wherever *mancipatio* holds good, *in jure cessio* also holds good. (G. 2, 22.) What the process is, has been told in an earlier part of our commentaries. (G. 2, 23.)

The form of conveyance has already been described under "*Mancipium*."

In that way persons, both slave and free, are conveyed (*mancipantur*); and animals (including oxen, horses, mules, asses), for they are *res Mancipi*. Landed property too, whether in town or country, if *res Mancipi* (as Italian lands, for instance, are), is usually conveyed in the same way. (G. 1, 120.)

But if a *res Mancipi* is transferred neither by *mancipatio* nor by *in jure cessio*. . . . And further, we must observe that *nexus* is peculiar to Italian soil, and is inapplicable to provincial. For *nexus* can be applied to land only when it is *res Mancipi*; and provincial soil is a *res nec Mancipi*. But provincial soil that has the *jus Quiritium*, stands in the position of Italian soil, and therefore can be conveyed by *mancipatio*. (G. 2, 26, 26A, 27, as restored.)

And again, of things moveable, or rather self-moving, the following are *res Mancipi*: slaves, male and female, and those tamed animals that are broken in as beasts of draught or of burden—oxen for instance, horses, mules, asses.

Now the teachers of our school think that these are *res Mancipi* from the moment of their birth. But Nerva, Proculus, and the other authorities of the opposing school, think they are *res Mancipi* only if broken in; or if so excessively wild that they cannot be broken in, that they become *res Mancipi* on reaching the age at which such animals are usually broken in. (G. 2, 15.)

On the other hand, wild beasts are *res nec Mancipi*, as bears, lions; and also those animals reckoned with wild beasts, as elephants and camels; and this is not affected by the fact that these animals are sometimes broken in as beasts of draught or of burden. And further, some of the smaller animals,—even of tamed animals, some of which, as we have said above, are *res Mancipi*,—are classed as *res nec Mancipi*. (G. 2, 16.)

And, again, almost all incorporeal things are *res nec Mancipi*, except servitudes over landed property in the country on Italian soil. These are *res Mancipi*, although reckoned with things incorporeal. (G. 2, 17.)

The passages from Gaius manifestly show that the group called *res Mancipi* was based upon no logical considerations, but must be ascribed to the accidents of history. It included some moveables, as it were, capriciously, and immoveables partly by a geographical and partly by an arbitrary boundary. The *res Mancipi* are characterised by the circumstance that they include things known to the Romans in the earliest times, and not such as became known only when they carried their conquests out of Italy. Thus immoveables out of Italy were *res nec Mancipi*; elephants and camels, although beasts of burden, are also *res nec Mancipi*, because they were introduced at a late period. The circumstance that rights of way and rights to water-courses are *res Mancipi*, but not rights to lights and others that only arise in crowded cities, shows that the group of *res Mancipi* was formed when the Romans were in a purely agricultural stage. The costlier jewels (as to pearls, see Pliny, 9, 35, 53) were excluded, because they were unknown at the time when the distinction was made. May not gold and silver have been omitted for the same reason?

The only article mentioned by Gaius, not to be explained on the score of antiquity, is garments. But, indirectly, that reason may be applied. It may be said that clothes were home-made, and rarely objects of sale. But the implements of agriculture, excepting stock, are apparently *res nec Mancipi*, and, therefore, another reason than mere antiquity seems required. It may be that these articles were of very trifling value. Dogs and cats were omitted, probably because nobody would have thought of selling them.

In brief, the origin of the distinction seems to have been as follows: When the Romans made the acquaintance of copper, and adopted it as the standard of value, a sale was accompanied by all the formalities constituting *mancipatio*. This form

they adhered to in all transactions of any importance. In the sale of lands, rights of way, cattle, or slaves, the formal conveyance was strenuously insisted upon. The formalities, it must be observed, occupied the place of written conveyances, and were valuable in their assistance to the memory of the witnesses, as well as in the solemnity they threw over the transaction. But in regard to clothes, crops, and the rude instruments of agriculture, partly, perhaps, because they may seldom have been the objects of commercial transactions, partly because they may have been of little value, it was not worth while going through the cumbersome ceremonial of the mancipation. For that reason probably these things might be transferred by simple delivery.

M. Ortolan adds two other grounds of distinction, which deserve a brief notice. He observes that *res Mancipi* are all of them things not consumed by using, whereas wine, &c., which are *res nec Mancipi*, are used by being consumed. But this, as he admits, does not really distinguish them, because many things, that are not consumed in using, are *res nec Mancipi*. A horse was a *res Mancipi*, but a waggon is not mentioned as such, and, therefore, may be considered a *res nec Mancipi*. An ox was a *res Mancipi*, but the plough was, for the same reason, probably not. These examples also serve to detract from the value of another distinction mooted by M. Ortolan. *Res Mancipi* are all specific objects, capable of easy identification by witnesses, and therefore excluded things that are sold by number, weight, or measure, as wine or corn.

A distinction of some importance existed between moveable *res Mancipi* and immoveable *res Mancipi*. Moveable *res Mancipi* could not be transferred unless in the presence of the parties; and so far was the origin of the word (*manu capere*) regarded, that not more could be conveyed than could be held in the hand. But immoveable *res Mancipi* need not be in the presence of the parties, but might consist of parcels in different parts of the country. (Ulp. Frag. 19, 6.)

But in one point the conveyance of landed property differs from the conveyance of everything else. For persons, both slave and free, and animals too that are *res Mancipi*, must be present in order to be conveyed; and not only present, but actually grasped by the receiver of what is given *Mancipio*, from which comes the term for such conveyance, *Mancipatio*, the thing being taken in the hand. But landed property is usually conveyed in absence. (G. 1, 121, last part restated.)

The mode of conveyance that superseded *Mancipatio* was "delivery." As delivery could take place only when the parties were on or near the land to be transferred, it was often less convenient than *Mancipatio*. Hence there continued to be a reason for keeping alive the ancient mancipations for land in Italy.

II. *IN JURE CESSIO*. Title by a fictitious surrender in court.

1. *In jure cessio* takes place thus: Before a magistrate of the Roman people, as the Praetor, or before the President of a province, the man to whom the thing is being granted appears holding it, and makes his claim thus: "This

man, I say, is mine, *ex jure Quiritium*." Then after he has made his claim, the Praetor asks him that grants it whether he will make a counter claim. And when he says no, or remains silent, then the Praetor makes over the property to the claimant. This is called a *legis actio*, and can take place even in the provinces before their Presidents. (G. 2, 24.)

Often, however, indeed almost always, we use *mancipatio*. For when we ourselves can do it by ourselves before our friends, it is needless to seek out a harder way of doing it before the Praetor, or the President of a province. (G. 2, 25.)

Three persons were thus required : the owner who conveys (*cedens*), the purchaser (*vindicans*), and the Praetor, who gives judgment (*addicit*). (Ulp. Frag. 19, 10.) It was a mode of alienation applicable both to *res Mancipi* and *res nec Mancipi*, to corporeal and incorporeal things. Thus a usufruct, or inheritance, or legal tutelage of a freedwoman, can be conveyed by this mode.

2. Restriction special to *in jure cessio*.

And finally, it must be observed that persons *in potestate*, *in manu*, or *in Mancipio*, can acquire nothing by *in jure cessio*. For since such persons can have nothing of their own, it follows that they can of themselves claim nothing as their own before a court of law *in jure*. (G. 2, 96.)

TRANSFER OF *RES MANCIPI* BY SIMPLE DELIVERY.

And next, we must note that among aliens there is but one form of ownership (*dominium*). So that in each case a man either is the owner, or is in no sense an owner. And this was the law formerly among the Roman people ; for in each and every case a man either was owner *ex jure Quiritium*, or was in no sense an owner. But afterwards ownership parted into two kinds ; so that one man may be owner *ex jure Quiritium*, and another have the property *in bonis*. (G. 2, 40.)

For if I transfer to you a *res Mancipi* neither by *mancipatio* nor *in jure cessio*, but by simply handing it over, then the thing becomes yours *in bonis*, but will remain mine *ex jure Quiritium* until you by continued possession acquire it by *usucapio*. For as soon as the full time for *usucapio* has run, the thing is yours at once by absolute right, that is, both *in bonis* and *ex jure Quiritium*, just as if it had been transferred by *mancipatio* or *in jure cessio*. (G. 2, 41.)

The aim of the law of prescription (*usucapio*) was to heal defective titles ; the conditions under which it applied will be stated presently. But a question arises, what were the rights of a purchaser, for example, that had obtained possession of a slave bought and paid for, but had not taken a conveyance by *mancipatio* or *cessio in jure* ? After the period of *usucapio* had expired, he was owner (*dominus ex jure Quiritium*), and was entitled to all the remedies provided by law for owners ; but suppose, before that time had expired, some one, making an adverse claim, took away the slave, what remedy had the pos-

essor? He could not sue as owner, because he was not owner; he could not sue the adversary as a robber, because the adversary set up a *bona fide* claim to the slave. It is possible that when interdicts were introduced (Appendix to *Dominium—Possessio*), the purchaser was protected against violent dispossession; but this remedy had imperfections of its own, and was subject to this special disadvantage, that it was not available against every possessor. In justice, however, a buyer, in the case supposed, ought to have as complete a remedy as if he were actually owner; and such a remedy was finally supplied by the Praetor by the aid of a fiction.

Of the same kind is the *actio* called *Publiciana*. For it is given to a man that seeks to recover property of which he has lost possession; property delivered to him for some lawful reason, but which he has not yet acquired by *usucapio*. Now he cannot in the *intentio* claim it as his *ex jure Quiritium*. By a fiction, therefore, he is held to have acquired it by *usucapio*, and being thus made quasi-owner *ex jure Quiritium*, he puts forward an *intentio* worded as follows: "Let there be a *judex*. If the slave that Aulus Agerius bought and had delivered to him had been in his possession for a year, if, in that case, the said slave, about whom the action is brought, ought to be his *ex jure Quiritium*, and so on."¹ (G. 4, 36.)

For the meaning of *intentio*, see Book IV., Proceedings in *Jure*.

Now those *actiones* of which we have spoken, and any like ones, are grounded on statute and on the *jus civile*. But there are other actions introduced by the Praetor in virtue of his jurisdiction; *actiones* both *in rem* and *in personam*. And of these we must give instances in order to show what they are. Often, for example, the Praetor allows an *actio in rem*, in which either the plaintiff affirms that he has acquired by quasi-*usucapio* what he has not acquired by *usucapio*; or, on the contrary, that the possessor, his adversary, has not acquired by *usucapio* what he has so acquired. (J. 4, 6, 3.)

For suppose that another's property is handed over to a man on a lawful ground, in the case of a purchase (for instance), a gift, a dowry, or legacies, and he has not yet become its owner. If now, by accident, he loses possession of that property, he has no direct *actio in rem* to recover it. For the *actiones* set forth by the *jus civile* are open only to those that claim as owners. But because it was doubtless hard that in such a case an action should be wanting, the Praetor brought in an action in which he that has lost possession affirms that he had acquired that property by *usucapio*, and so claims it as his own. And this is called the *Actio Publiciana*, because it was first put forth in the edict by the Praetor Publicius. (J. 4, 6, 4.)

Cicero mentions a Quintus Publicius as Praetor about B.C. 66. (Pro Cluentio, 45.)

After the *Actio Publiciana* was introduced, a buyer, without

¹ *Judex esto. Si quem hominem Aulus Agerius emit (et is) ei traditus est, anno possideret, tum si eum hominem, de quo agitur, ex jure Quiritium ejus esse oporteret et reliqua.*

taking a title by mancipation, became, for nearly all purposes, owner. He could not, until his title was perfected, convey the property by *mancipatio* or *cessio in jure* to another; but he could practically accomplish the same object by simple delivery. Why then, it may be asked, did the cumbrous form of mancipation survive? Why did it continue to be employed until, at least, the time of Gaius, and probably many years afterwards? A reason has been already mentioned why, in the case of land, mancipation should have been maintained. A conveyance of land by mancipation could be effected at any distance from the land, but a conveyance by simple delivery required to be on the spot. In the case of slaves a different reason existed. No one but a legal owner (*dominus ex jure Quiritium*) could employ a public mode of manumission; under the Empire, the utmost that a person could do, whose title was not perfected by *usucapio*, was to make his slave a Latin (*Latinus Junianus*). (G. 1, 17; G. 1, 33-35.) In every other respect, however, the imperfect was as good as the perfect title. The owner of a slave, sold and delivered, although he remained technically owner (*dominus ex jure Quiritium*), was not permitted to exercise any of the rights of an owner. (G. 1, 54.) Thus if an inheritance were left to the slave, it became the property of the buyer, not of the owner, who retained a mere naked title without any beneficial interest. (G. 2, 88; G. 3, 166.)

In the time of Gaius the *mancipatio* was still employed, and the technical difference between Quiritarian and (as it has been termed by modern writers on law) Bonitarian ownership was still maintained. But between the time of Gaius and Justinian the *mancipatio* fell into desuetude; and even the very name, so redolent of antiquity, of the old owner (*dominus ex jure Quiritium*) had become a puzzle to lawyers. Justinian tells us that the old distinction was obsolete, and he ordered the phrase *dominus ex jure Quiritium* to be expunged from the legal vocabulary, as serving no purpose but to perplex students on their first acquaintance with the law. (C. 7, 25, 1.) The old Publician Action was, however, still referred to, and the edict of the Praetor is quoted by Justinian.¹ "I will give an action to any one that demands that which has been delivered to him

¹ *Si quis id quod traditur ex justa causa non a domino et nondum usucaptum petet, judicium dabo.*

on some lawful ground by another than the owner, and of which he has not acquired the ownership by *usucapio*." (D. 6, 2, 1, pr.) As given by Justinian, the edict omits words that must have at one time been in it, "or by an owner without *mancipatio* or *cessio in jure*," or words to that effect. By means of the Publician Action, therefore, any one could recover property from third persons if he had all the requisites of a title by *usucapio*, except only the lapse of the necessary time.

III. *USUCAPIO*.

Usucapio is the acquisition of ownership by possession for the length of time required by law. (D. 4, 1, 3, 3; Ulp. Frag. 1, 9, 8.)

The full time for *usucapio* of moveables is a year, but of lands or houses two years. This is provided by the statute of the XII Tables. (G. 2, 42.)

And this rule was adopted lest the ownership of property should remain too long uncertain. For the space of a year or two years—the time in which a possessor was allowed to acquire by *usucapio*—was long enough for an owner to look after his property. (G. 2, 44.)

The subject of *usucapio* may be considered under the following heads :—

1. The conditions necessary to acquisition *per usucapionem*.

1°. A certain length of possession.

2°. Uninterrupted possession.

3°. *Bona fides*.

4°. *Justus Titulus*.

2. Special restrictions on this mode of acquisition.

A. As to Persons.

1°. Persons against whom the time of possession does not count.

2°. Persons in favour of whom the time of possession does not count.

B. Things that cannot be acquired *per usucapionem*.

1. The conditions necessary to acquisition *per usucapionem*.

1°. A certain length of possession.

There is no difficulty in measuring the time, one or two years as the case may be, when the thing remains continuously in the possession of one person for the whole time; but does the time run when the thing has passed out of the possession of the first holder? The answer to this question depends upon several circumstances. When the times of possession of two holders may be counted together to make a title, there is said to be an addition of possession (*accessio possessionis*). The following passage in the Institutes has suggested a doubt whether accession of this nature was permitted in *usucapio*, or whether it was first introduced when the newer kind of pre-

scription — called long possession — was brought in. Cujas thought that the passage implied that no accession existed in the case of *usucapio*, but it seems hardly credible that the purchaser could not count the time of the vendor; and the conjecture of Vinnius that Justinian refers to his *usucapio* of moveables in three years may be accepted as a way out of the difficulty.

Long possession that had begun to the profit of the deceased goes on without a break to his heir or *bonorum possessor*, and that though he knows the estate is another's. But if the possession by the deceased began unfairly, the heir or *bonorum possessor*, though ignorant of this, cannot profit by the possession. And a constitution of ours has settled that in *usucapio* too the like rules shall be observed, so that the time goes on, being reckoned without a break. (J. 2, 6, 12.)

(1°.) Universal Succession.—In this case the rule is as stated by Justinian. The good or bad faith of the universal successor is immaterial. Hence, if the deceased bought a slave that he believed to belong to the seller, but his heir knows that it did not, his heir may nevertheless continue the *usucapio*, and become owner when the necessary time has elapsed. The reason is, that the good faith required to support *usucapio* relates to the moment at which the possession is acquired; if the possessor afterwards discovers that he is mistaken, he is not bound to give up the thing he has bought. The knowledge of the heir, who is regarded not as a new person, but as continuing the legal personality of the deceased (D. 44, 3, 11), is equivalent to such a subsequent discovery on the part of the deceased, and therefore does not affect his title.

Illustrations.

A thing has been bought by the deceased, but not been delivered to him in his lifetime. It is first given to the heir, and the heir knows that it does not belong to the seller. The possession of the heir is tainted with bad faith from the first, and consequently he takes no advantage from the good faith of the deceased. (D. 41, 3, 43.)

A person has kept a slave that he knew to belong to another, and dies. His heir is ignorant of the fact. The bad faith of the deceased prevents the heir acquiring it *per usucapionem*. (C. 7, 30, 3.)

(2°.) Singular succession.

Buyer and seller too reckon their times jointly, as the late Emperors Severus and Antoninus laid down in rescripts. (J. 2, 6, 13.)

When a person acquires possession from another by gift, purchase, or otherwise than by universal succession, the bad

faith of one does not vitiate the title of the other. Hence, if both possessors hold in good faith, the time of each is added to make *usucapio*; but if either holds in bad faith, only the time of possession of the other is reckoned. (C. 4, 48, 3; D. 41, 4, 2, 17.)

Illustration.

A acquires possession of a moveable in good faith, and after six months sells it to B, who, after keeping it five months, sells it to C. If B and C are ignorant of any defect in the title, C becomes owner in a month. (D. 41, 3, 15, 1.)

2°. The possession must be uninterrupted. An interruption of possession is called *usurpatio* (D. 41, 3, 2), and is either physical interruption (*naturalis usurpatio*), or legal interruption, when a hostile claim is set up.

(1°.) Natural or physical interruption (*naturalis usurpatio*) occurs when the possessor is ejected by force, or when a moveable is carried away by force or fraud. (D. 41, 3, 5.)

Illustration.

A obtains a gift of a slave from one whom he believes to be owner, and within a year manumits the slave *per vindictam*. The donor of the slave was not really the owner. The manumission is not valid, because A was not owner (*dominus ex jure Quiritium*); but it interrupts the possession, as A deliberately resigned his right to the slave. (D. 41, 6, 5.)

EXCEPTIONS.—Possession was not lost when a thing was pledged. The creditor had possession both in law and in fact, but his interest was not in the possession for its own sake, but merely as security for his claim, and for the purpose of *usucapio* the possession of the owner was not regarded as interrupted. (D. 41, 3, 16.)

The same rule was observed when an immoveable was let to a tenant-at-will (*precarium*). The tenant had, as will be shown afterwards, legal possession, but still it was not an interruption to break the *usucapio*. (D. 41, 1, 36.)

But if the creditor parts with the possession to another, by selling the thing pledged or otherwise, the *usucapio* is broken. The same rule applies when the possession of a moveable is parted with on loan or for deposit; the *usucapio* is not broken unless the borrower or depositor delivers the moveable to another. (D. 41, 3, 33, 4.)

(2°.) Legal interruption (*civilis usurpatio*). *Usucapio*, properly speaking, was not interrupted by legal proceedings. (D. 41, 4, 2, 21; D. 41, 6, 2.) But in consequence of the general rule

that judgment in an action proceeded on the facts as they existed at the time of the commencement of the action (*litis contestatio*), (Book IV., *Litis Contest.*), if the period of *usucapio* had not then expired, the owner could recover his property, although it had expired before judgment was given.

3°. The possessor, to become owner by *usucapio*, must believe at the time he obtains possession that he has a legal power of disposition (*bona fides*). (D. 41, 4, 47; D. 18, 1, 27.)

We may acquire by *usucapio* even things delivered to us by one that was not their owner, and that whether they are *res mancipi* or *res nec mancipi*, if only we received them in good faith, believing that he that delivered them was the owner. (G. 2, 43.)

The belief, if erroneous, must have reference to a fact; if it arose from a mistake in law, it profits the possessor nothing. (D. 41, 3, 31.)

Illustrations.

Seius buys a thing from a person that he knows has been interdicted by the Praetor from disposing of his property. He cannot gain by *usucapio*. (D. 41, 3, 12.)

Titius purchases a slave from a boy that he knows is a pupil, under the mistake in law that a pupil can sell without the consent of his tutor. Titius is not a *bona fide* possessor, and does not acquire by *usucapio*. (D. 41, 4, 2, 15.)

At what moment must the good faith (*bona fides*) exist? Upon this question a controversy existed between the two schools of the Sabinians and Proculians. The difference of opinion came out most distinctly in the case of sale. When the price was agreed upon by the buyer and seller, the buyer at once acquired a right to the delivery of the thing; but until it was delivered, he had no right, as against the world, to the thing itself. Which point, then, ought to be selected as the moment at which good faith should be required?—the moment of sale, when the right to delivery was acquired, or the moment when, by delivery, possession was actually obtained? The Proculians urged that the time of sale ought to be looked to; the Sabinians, the time of delivery; and this opinion, Ulpian tells us, was adopted. Hence if between the time of sale and delivery the buyer came to learn that the seller was not owner, he obtained a possession tainted with a knowledge of illegality, and, therefore, failed to acquire by *usucapio*. (D. 41, 3, 10; D. 41, 3, 15, 3.)

In the case of moveables, the good faith of the possessor seldom availed him anything, because moveables, if disposed of

unlawfully, were generally regarded as stolen, and, as will be seen presently, stolen goods could not be acquired by *usucapio*.

But sometimes it is otherwise. For if an heir, in the belief that a thing lent or hired out to the deceased or deposited in his hands forms part of the inheritance, sells that thing to some one that receives it in good faith, or gives it away as a present or as a dowry, there is no doubt that the receiver may acquire it by *usucapio*, since the thing is no way tainted by theft; seeing especially that the heir that alienates in good faith, believing it to be his own, commits no theft. (J. 2, 6, 4; G. 2, 50.)

And again, if the man that has the usufruct of a female slave believes her offspring is his, and sells or gives it away, he does not commit theft. For there is no theft where there is no theftuous aim. (J. 2, 6, 5; G. 2, 50.)

And in other ways it may happen that a man may transfer to some one what is a third person's, yet without any taint of theft; and so the possessor may acquire it by *usucapio*. (J. 2, 6, 6; G. 2, 50.)

A farm that belongs to another any one may obtain possession of without force, if it is lying neglected by the carelessness of its owner, or by his death without leaving a successor, or by his long absence. If, then, such a possessor transfers it to another that receives it in good faith, this new possessor will be able to acquire it by *usucapio*. And even although he that obtained possession of the farm while it was unoccupied knew that it belonged to some one else, yet this does not impair the claim to *usucapio* of the possessor in good faith. For the opinion is now quite set aside, that a farm can be the object of theft. (G. 2, 51.)

EXCEPTIONS.—In some cases *bona fides* was not required.

(1°.) On the other hand again, it happens that a man that knows he is in possession of another's property may acquire it by *usucapio*. An object, for instance, forming part of an inheritance, if the heir has not yet obtained possession, any one may possess. For he is allowed to acquire it by *usucapio* if the object is such as to admit of *usucapio*. And this kind of possession and *usucapio* is called *pro herede* (in room of the heir). (G. 2, 52.)

And so far is this allowance carried, that even landed property may be acquired by *usucapio* in a year. (G. 2, 53.) And the reason why even in the case of landed property the one year's *usucapio* obtains is, that formerly inheritances themselves were believed to be acquired as it were by *usucapio*, by possession of the inherited effects. (And that of course in a year; for the statute of the XII Tables ordained that landed property should require two years for *usucapio*, all other property one year. An inheritance, then, seemed to fall under the "all other property;" for it is not landed, seeing it is not even corporeal). And though the later belief was that inheritances could not be acquired by *usucapio*, yet in regard to all property forming part of an inheritance, even landed property, the period of a year for *usucapio* remained. (G. 2, 54.)

And the reason why so unscrupulous a possession and consequent acquisition were allowed at all was this:—the ancients wished heirs to enter on inheritances with all speed, that there might be persons to perform the sacred rites then observed with the utmost care, and that the creditors might have some one from whom they could obtain what was theirs. (G. 2, 55.)

This kind of possession and of *usucapio* also is called *lucrativa* (gainful). For in it a man knowing that something is another's, yet makes gain therefrom. (G. 2, 56.)

But in our day it is no longer gainful. For at the instance of the late Emperor Hadrian, a *Senatus Consultum* was passed declaring that such acquisitions might be recalled. The heir, therefore, by laying claim to the inheritance, may recover the property from him that has acquired it by *usucapio*, just as if it had never been so acquired. (G. 2, 57.)

And yet even though there were a *heres necessarius* in existence, by the strict rule of law some one else might acquire the property by *usucapio pro herede*. (G. 2, 58.)

These passages anticipate some observations that fall to be made in regard to the history of inheritance. (See Book III.)

(2°) Again, if property is mortgaged to the people, and is sold by them, and the owner comes into possession, in this case *usureceptio* is allowed. For land, however, it requires two years. This is the meaning of the common saying, that after a public sale of lands (*praediatura*), possession is regained by use (*usurecipi*). For he that buys from the people is called *praediator*. (G. 2, 61.)

The meaning of this appears to be, that if the buyer does not turn out the owner for two years after the sale, he forfeits his purchase.

4°. *Justus Titulus*.

Possession by mistake, on some untenable ground (*error falsae causae*), does not give rise to *usucapio*. As, for instance, when the possessor has not bought a thing, but thinks he has bought it; or has not been given it, but thinks he has been given it. (J. 2, 6, 11.)

The most usual case where this mistake arose was when a thing was conveyed to a man in a way that would have made him owner, but for the fact that the person executing the conveyance had no right to alienate the thing. (C. 7, 33, 11.) This was not an *error falsae causae*. If there was no intention to transfer the ownership, as when possession was given to a mortgagee, there could not be a *justus titulus*, and the mortgagee did not acquire by *usucapio*. (D. 41, 3, 13.)

2. Special restrictions on acquisition by *usucapio*.

A. As to persons.

1°. Certain persons could not be deprived of their property by adverse possession, on the ground that they were not in a position to assert their rights. The theory upon which *usucapio* was based, was the presumed neglect of the owner. If an owner, after being allowed a reasonable time to discover and claim his property, made no claim, it was but fair that the innocent possessor should obtain a perfect title. If, however, the true owner were in a position where he could not protect his interests, it was reasonable that the adverse operation of *usucapio* should be suspended until such time as his disability was re-

moved. The suspension ought not, however, to go beyond that limit. (D. 4, 6, 37.) Hence the following persons were allowed to rescind a title acquired by *usucapio*, if they applied within one year from the time their disability ceased. (C. 2, 50, 3.)

(1°.) Persons under the age of twenty-five years could rescind a title, even if their interests were looked after by tutors or curators, if the Praetor thought the application was made on good grounds. But if they were not defended, they were entitled absolutely to rescind the acquisition. (D. 4, 1, 8.)

(2°.) Persons absent on the service of the State. This includes soldiers on actual service (D. 4, 6, 45), (not on furlough, D. 4, 6, 35, 9), army doctors (D. 4, 6, 33, 2), Governors of Provinces, and other officials (D. 4, 6, 35, 3), and the wives of such persons. (C. 2, 52, 1.) Their privilege lasted from the time they left home until they returned.

(3°.) Persons in custody (*in vinculis*), or captured by brigands or pirates. (D. 4, 6, 9.)

(4°.) Persons living in slavery (D. 4, 6, 11) until an action is brought claiming freedom. (D. 4, 6, 12.)

(5°.) Captives taken in war. (D. 4, 6, 1, 1.)

2°. Certain persons cannot acquire by *usucapio*.

On the contrary, again, if a man away in the service of the commonwealth or in the enemy's power acquires by *usucapio* the property of a citizen at home, then the owner is allowed, when once the possessor has ceased to be away in the service of the commonwealth, to lay claim to the property within a year, and rescind the *usucapio*. And the form of the claim is this; the owner affirms that the possessor has not got the property by use, and that it is therefore his. And this sort of action, the Praetor, moved by a like desire for fairness, puts within the reach of certain others also, as one may learn from the larger volume of the Digest or Pandects. (J. 4, 6, 5.)

This is the converse case. In the former, an absent owner was allowed to rescind a title acquired by *usucapio*, because he was not in a position to prevent the acquisition; in this case, an owner at home was allowed to rescind a title acquired by a person that, being absent, could not be sued. In the second case, the ground of relief was that, owing to his being beyond the jurisdiction, or from some other cause, an action could not sooner be brought. (D. 4, 6, 21, pr.) Thus rescission was granted against Consuls or Praetors after their year of office, because previous to that time they could not be sued; but not against patrons at the instance of freedmen, or parents at the instance of children, because the Praetor in those cases could allow an action if he thought fit. (D. 4, 6, 26, 2.) In like manner, insane persons, or children that acquired by *usucapio*, could be sued after their disability was removed, and the acquisition rescinded. (D. 4, 6, 22, 2.) Again, the same remedy availed against those that by craft had prevented an action being brought against them. (D. 4, 6, 24.)

The action employed in these cases, and introduced by some Praetor, was called *Actio Publiciana rescissoria*. It must be brought within a year from the removal of the disability (C. 2, 50, 3), and it could be brought against the heirs of the persons that acquired by *usucapio*. (D. 4, 6, 30; D. 50, 17, 120.)

B. As to things.

As *usucapio* was a mode of acquiring ownership (*dominium ex jure Quiritium*), it follows that whatever things were incapable

of being held in such ownership, were not susceptible of *usucapio*.

1°. But sometimes, notwithstanding the utmost good faith in the possessor of a thing, *usucapio* never begins to run. As, for instance, when he is in possession of a freeman, of something that is sacred or devoted, or of a runaway slave. (J. 2, 6, 1; G. 2, 48.)

2°. Estates in the provinces, too, do not admit of *usucapio*. (G. 2, 46.)

3°. And formerly the *res mancipi* belonging to a woman in the *tutela* of her agnates could not be acquired by *usucapio* unless she had delivered them by authority of the *tutor*; for so the statute of the XII Tables provided. (G. 2, 47.)

4°. Property belonging to our *fiscus* cannot be acquired by *usucapio*. But Papinianus gave a written opinion, that if unclaimed property has not yet been reported to the *fiscus*, any portion of it delivered to a purchaser in good faith may be acquired by him by *usucapio*. And so the late Emperors Pius Severus and Antoninus have declared in rescripts. (J. 2, 6, 9.)

An edict of the late Emperor Marcus provides that the purchaser of another's property from the *fiscus* may, when once five years have passed since the sale, successfully resist the owner of the property by an *exceptio*. And a constitution of Zeno too, of blessed memory, has provided well for those that receive anything from the *fiscus* by sale or gift, or any other title. For it provides that they are at once free from all concern, and must come out successful, whether they are sued or themselves go to law; while against the sacred majesty of the Treasury an action may be brought at any time within four years by those that think that in virtue of their rights as owners, or as mortgagees of the property alienated, some actions are open to them. Our own imperial constitution too, lately published, makes the same regulations with regard to those that receive anything from our palace or that of the Empress (*venerabilis Augustae*), as are contained with regard to alienations by the *fiscus* in the constitution of Zeno just mentioned. (J. 2, 6, 14.)

And last of all, it must be observed that the thing ought to be free from any taint in order that the purchaser in good faith, or other possessor on lawful grounds, may acquire it by *usucapio*. (J. 2, 6, 10.)

5°. Sometimes, however, notwithstanding the utmost good faith in the possessor of another's property, the time for *usucapio* never begins to run. (G. 2, 45.) For things stolen or possessed by force cannot be acquired by *usucapio*, not even if possessed in good faith during the long time of which we have spoken. For in the former case it is restrained by the statute of the XII Tables and the *lex Atinia*, in the latter by the *lex Julia et Plautia*. (J. 2, 6, 2; G. 2, 45.)

And the bearing of the saying that in the case of things stolen or possessed by force *usucapio* is forbidden by law, is, not that the thief or possessor by force cannot in person acquire by *usucapio* (for, on another ground, *usucapio* is not open to them, because, namely, they are possessors in bad faith); but this—that no one else, although in good faith he buys or on other grounds receives from them, can have any right to acquire by *usucapio*. And hence, in regard to moveables, *usucapio* by a possessor in good faith must be rare. For he that sells, or on any other ground delivers what is another's, therein commits a theft. (J. 2, 6, 3; G. 2, 49, 50.)

The *lex Atinia* seems to have extended the law of the XII Tables to the case of *bona fide* possessors. It was passed about B.C. 197, or not later than B.C. 153.

Illustrations.

A tutor fraudulently sells part of the property of his pupil, Titius. A tutor had a power of sale only so long as he acted in good faith in the administration of his pupil's property. The moment he attempted to cheat his pupil he was regarded as a thief, and the thing parted with was stolen goods (*res furtiva*). Hence it could not be acquired by a possessor even if ignorant of the fraud. (D. 41, 4, 7, 3.)

A tutor, in disregard of the express order of the Will by which he was appointed, sold some slaves that on account of their skill the testator ordered to be kept for his heirs, to a purchaser ignorant of the prohibition: there can be no *usucapio* of the slaves. (C. 7, 62, 2.)

A slave, to defraud his master, carries off some of his separate estate (*peculium*), and delivers it to Gaius. As soon as it is delivered it becomes stolen property, not susceptible of *usucapio*. This is the more noteworthy, because as between the master and the slave such malversation did not constitute theft. (D. 47, 2, 56, 3.)

A has stolen and carried off wool, and has made it into a garment. The owner of the wool can recover the garment, because there is no *usucapio*. (D. 41, 3, 4, 20.)

A female slave is stolen by Balbus, and while in his possession gives birth to a child. Balbus sells the child to Titius, who is ignorant of the theft of the mother. The owner of the female slave can recover the child from Titius, because on account of the theft there is no *usucapio*. (C. 6, 2, 12.)

A mare is stolen, and sold by the thief to a purchaser ignorant of the theft. The mare gives birth to a foal. The foal belongs to the purchaser (as soon as born), because it is considered part of the produce (*fructus*) of the mare. But the child of a female slave was not regarded in that light (as *fructus*), and hence the difference in the result. (D. 41, 3, 4, 18; D. 47, 2, 48, 6.)

A female slave is stolen, and sold by the thief to a purchaser ignorant of the theft. She gives birth to a child. The purchaser has no right to either, and acquires none by *usucapio*. But if the slave had not conceived until she was in the possession of the buyer, her child would belong to him by *usucapio*. (D. 47, 2, 48, 5.)

A sheep is stolen, and its wool clipped by the thief. The wool is not susceptible of *usucapio*. But if the sheep is shorn by a purchaser ignorant of the theft, the wool, as part of the produce (*fructus*), becomes his property at once without any *usucapio*. (D. 41, 3, 4, 19.)

Sometimes even a thing stolen or possessed by force may be the object of *usucapio*. If, for instance, it comes back under the power of the owner, the taint attached to the property is cleared away, and *usucapio* goes on. (J. 2, 6, 8.)

It was necessary that the owner should not merely regain possession of the thing stolen, but also know that it had been stolen. (D. 41, 3, 4, 12.) This was provided for by the *lex Atinia*. (D. 41, 3, 4, 6.) If the owner knew where the stolen goods were, so that he could bring an action to recover them, he was considered to have possession of them within the meaning of that enactment. (D. 50, 16, 215.)

6°. Immoveables taken by force. (*Res immobiles vi possessae*.)

The sections above quoted refer to immoveables taken by force, as regulated by the *lex Plautia* (the date of which is supposed to be B.C. 89), and the *lex Julia*, supposed to belong to the reign of Augustus.

As regards landed property, *usucapio* goes on more easily. A man may, for instance, without force, obtain possession of a spot left unoccupied by reason of its owner's absence or neglect, or because he has died and left no successor. This man, personally, no doubt, is a possessor in bad faith, for he knows that he has seized on land belonging to another. If, however, he delivers it to a third person that receives it in good faith, then that third person can acquire the property by length of possession, for he received it neither stolen nor possessed by force. For the opinion of some of the old writers, who thought a farm or a piece of land might be the object of theft, is now extinct. And the imperial constitutions provide that possessors of landed property ought in no case to be deprived of a long and undoubted possession. (J. 2, 6, 7.)

Illustration.

A drives B out of possession, but does not himself enter. C, finding the land vacant, enters and takes possession. C is not a *bona fide* possessor, and therefore cannot acquire by *usucapio*. He knows he is not owner. Before B returns, C sells to D, who is not aware of the nature of his possession. D can acquire by *usucapio*. (D. 41, 3, 4, 22.)

The purgation is the same as in the case of stolen property. (D. 41, 3, 4, 26.)

A. TRANSVESTITIVE FACTS ASCRIBED TO THE *JUS GENTIUM*.

I. ACCESSION (*Accessio*).

The doctrine of accession is the counterpart of occupation. (D. 41, 1, 6.) By occupation, what belongs to nobody is acquired; by accession, what belongs to somebody is given to a new owner. This occurs when that which belongs to one person is so intermixed with the property of another, that either it cannot be separated at all, or cannot be separated without inflicting damage out of proportion to the gain. Upon this state of facts two questions arise—(1.) Who is owner of the joint whole? and (2), What compensation, if any, must be made to the loser? The answer to the first question is to be found in the idea of Principal and Accessory. This idea is very simple in many cases; thus dress exists for men, not men for dress; buttons exist for coats, not coats for buttons. That which can exist without another, but that other cannot exist without it, or that for whose sake another exists, is the principal to which the other is the accessory. It was laid down that the owner of the principal became the owner of the accessory. This technical rule sufficed to determine the technical question—which of the two is owner? but it leaves untouched the important practical question, what compensation ought to be given to the loser? As a general rule, it

would be inequitable to deprive an owner of his property without compensation, merely from the accident of its becoming attached to, or mixed up inseparably with, the property of another. In considering the cases stated in the Roman Law, these two questions must be kept broadly separate.

1. Accession of land to land.

1°. And, further, what a river adds to your field by *alluvio* is by the *Jus Gentium* acquired by you. And by *alluvio* is meant a latent increase; and an addition by *alluvio* is an addition so gradual as to be at each moment imperceptible. (J. 2, 1, 20; G. 2, 70.)

But if the violence of the river sweeps away a part of your land and bears it over to your neighbour's land, where it rests, then plainly it still continues yours. But it is evident that if it sticks to your neighbour's land for a long time, so that the trees carried away with it strike root into his land, then from that time those trees are acquired for your neighbour's land. (J. 2, 1, 21; G. 2, 71.)

2°. If an island rises in a river, as often happens, its ownership depends on its position. If it lies in mid stream, it is common to the landowners on both banks of the river, in shares proportioned to the extent of each owner's lands, as measured along the bank. But if it is nearer one side than the other, it belongs solely to the landowners along the bank on that side.

And if a river forks at any point, and the branches meet lower down, so as to make some one's land an island, then that land continues to belong to its former owner. (J. 2, 1, 22; G. 2, 72.)

An island floating on reeds or shrubbery belongs to the public, and not to either of the riparian proprietors; because it is not connected with the land, and the water in the river is public. (D. 41, 1, 65, 4.)

Proprietors on the same side of the stream share an island according to the extent of their lands, measured by a straight line across the river from their boundary. (D. 41, 1, 29.)

If an island rises in a stream so that it belongs wholly to the owner on one side of the bank, and then another in the middle, is the line from which the measure is to be taken the bank or the island? It was held to be the island. (D. 41, 1, 65, 3.)

3°. But if a river altogether abandons its natural bed and begins to flow elsewhere, then that former bed belongs to the landowners on both banks of the river, in shares proportioned to the extent of each owner's lands as measured along the bank. And as for the new bed, it becomes subject to the same rights to which the river itself is subject; that is, it becomes public property. But if, after some time, the river returns to its former bed, the new bed in turn comes to belong to the landowners on the bank. (J. 2, 1, 23.)

Clearly the case is different when any one's land is entirely flooded. For flooding does not change the nature of the lands; and therefore, if the water falls, it is plain that the lands belong to their former owner. (J. 2, 1, 24.)

Illustration.

An island rises in a river so as to belong wholly to A, the owner of one of the banks. Then the river deserts its old channel, and runs entirely between the island and A's bank. A retains the island and his share of the deserted channel. (D. 41, 1, 56, 1.)

EXCEPTION.—These rules, relating to the accession of land to land, apply only to those lands whose boundaries are natural objects (*arcifinii agri*), such as a river, wood, or mountain. When land was held in specified quantities (*agri assignati* or *limitati*), the accessions belonged to the State, and not to the owners of the lands. These lands, apportioned in quantities, were generally obtained by conquest, and given away by the State, which reserved its rights to accessions. (D. 41, 1, 16.) In one passage it is stated, however, that such accessions were regarded as nobody's land (*res nullius*), and belonged to the first occupant. (D. 43, 12, 1, 6.)

It is manifest also that in accessions of land to land there was no room for compensation. Thus alluvial deposits come from the lands of many people, nobody could tell where.

2. Accession of moveables to land.

1°. Buildings to land.

(1°.) The question of ownership.

Besides, what any one builds on our soil, although he builds it in his own name, by the *Jus Naturale* becomes ours. For all that is on the soil goes with the soil (*superficies solo cedit*). (G. 2, 73.)

When a man builds on his own soil with materials that belong to another, then he is regarded as the owner of the building. For all that is built on the soil goes with the soil (*omne quod inaedificatur solo cedit*). And yet he that was owner of the materials does not cease to be their owner. But, meanwhile, he can neither reclaim them (*vindicare*), nor bring an action for their production, because the statute of the XII Tables provides that no one can be forced to take out of his house a timber (*tignum*), though belonging to another, that has once been built into it. The statute gives, however, an action for double its value, called *actio de tigno injuncto*; and under the term *tignum* all building materials are included. Now the aim of this provision was to avoid the necessity of having the buildings pulled down. But if for any reason the building comes down, then the owner of the materials, if he has not already obtained the double value, may reclaim his own or bring an action for its production. (J. 2, 1, 29.)

Illustrations.

A contractor that builds with his own material for the owner of the land, as soon as the stones are fixed with mortar, loses his ownership in the material, which now becomes attached to the ownership of the land. (D. 6, 1, 39.)

Titius places a new barn, made of wood, on the land of Seius. It is not fixed but moveable. It does not become the property of Seius. (D. 41, 1, 60.)

(2°.) Compensation to the owner of the materials.

(α) When the owner of the land takes material belonging to another without his consent, he is liable to a penalty of double the value of the things taken.

(β) When the material is fixed on the land by a person in possession, who believes himself to be owner, but against whom an action is brought by the true owner, the possessor can resist the action, unless compensation is given him.

On the contrary, if a man builds a house with his own materials on another man's soil, then the house belongs to the owner of the soil. But in this case the owner of the materials loses his rights as such, because it is understood that they were alienated by his own will, supposing, that is, that he was not ignorant that he was building on another man's soil. And therefore, although the house comes down, he will not be able to reclaim the materials. But of course it is agreed that if the man that builds has been put in possession, and the owner of the soil claims the house [or farm] as his, but will not pay the price of the materials and the workmen's wages, [or other expenses on the building, the plantations, or the cornfields], then he may be repelled by the plea (*exceptio*) of fraud (*dolus malus*), seeing the builder was a possessor in good faith. (J. 2, 1, 30; G. 2, 76.)

A *bona fide* purchaser that, after notice of the insufficiency of his title, builds on the land, cannot resist an action by the owner, who refuses to give compensation: only he is allowed to take down the building at his own cost and carry it away. (D. 6, 1, 37.)

(γ) When a *bona fide* possessor has given up or lost possession he has no remedy, and cannot obtain compensation unless his expenditure has been made with the knowledge of the owner.

Illustrations.

A person is in possession as heir, and repairs the family mansion; he cannot recover his expenses except by keeping possession. (D. 12, 6, 33.)

A husband or wife builds on ground received from the other as a gift. The gift of the ground is void (see *Donations between Husband and Wife*), but the house could be preserved by pleading fraud. (D. 44, 4, 10.)

If I have given any one property, but have not yet delivered it, and he to whom I have given it, although possession has not been delivered, builds on that spot with my knowledge, and if after he has built I have obtained possession, and he claims from me the property given him, and I plead in bar that the gift was void as exceeding the limits fixed by the *lex Cincia*, then can he plead fraud in answer to my plea? Certainly, for I acted fraudulently in suffering him to build and now withholding his expenses. (D. 44, 4, 5, 2.)

(δ) For if he knew that the soil was another's, his own negligence in rashly building on a soil that he was well aware was another's may be brought up against him. (J. 2, 1, 30.)

It is stated, however, by Antoninus (C. 3, 32, 2), that if the building has fallen into ruin, the material, even in this case, returns to the former owner, provided that the original intention of the builder was not to make a present of the material to the owner of the land.

EXCEPTION.—A very important exception existed when there was a contract of hiring between the owner and the possessor.

Illustrations.

If a tenant has made a door or anything else joined to a building, he has a right to take it away, although it be a fixture, provided he gives security not to damage the house, but leave it as he found it. (D. 19, 2, 19, 4.)

Whatever a farmer does to the land for its improvement, either by building or otherwise, gives him a title to compensation if such improvements have not been part of his bargain, and a consideration in fixing the rent. (D. 19, 2, 55, 1.)

A farmer that was not compelled by his agreement to plant vines did so, and increased the letting value more than 10 *aurei* yearly. The farmer in an action for rent brought against him can set off this improvement. (D. 19, 2, 61, pr.)

2°. Trees and plants to land.

(1°) Ownership.

If Titius places in his soil a plant belonging to another, it will become his. If, on the contrary, Titius places a plant of his in Maevius' soil, the plant will belong to Maevius, provided that in both these cases the plant has taken root; for until it takes root it continues to belong to its former owner. So completely, however, is its ownership changed from the moment it takes root, that if a neighbour's tree so presses the earth belonging to Titius as to take root in his field, we say that it is thereby made Titius' tree. For reason refuses to regard the tree as belonging to any one except the owner of the field in which it has taken root. And, therefore, if a tree placed close to a boundary strikes its roots into a neighbour's field, it becomes common property. (J. 2, 1, 31; G. 2, 74.)

And on the same principle as plants that unite with the earth go with the soil, so corn too that is sown is understood to go with the soil. (J. 2, 1, 32; G. 2, 75.)

A difference existed between the case of buildings and plants. Even if the tree was afterwards torn up, it did not revert to its former owner. (D. 41, 1, 26, 2.) After it had fed on the soil, it was not exactly the same thing that was planted; and it would be absurd to allow a man to recover, after thirty or forty years, a full-grown tree, because the sapling from which it grew had been his property. (D. 41, 1, 26, 2.)

The assertion in the text seems to be opposed to D. 47, 7, 6, 2, which states that although a tree near a boundary sends its roots into the neighbour's soil, it nevertheless remains the property of the owner of the soil in which it first grew. The text is therefore explained as referring to those cases only where the tree is on the land of one man, and the roots wholly, or nearly so, in the land of his neighbour.

(2°) Compensation.

(a.) The owner of the land has sown or planted with what belongs to another. If he knew that the seeds or plants

belonged to another, he commits theft; if he did not, he must simply pay the owner their value. (D. 6, 1, 5, 3.)

(β) But as he that has built on another's soil can defend himself against a claim for the building on the part of the owner of the soil by means of the plea of fraud, as we have said, so by the aid of the same plea he can protect himself that has sown another's farm in good faith at his own expense. (J. 2, 1, 32.)

(γ) A *bona fide* possessor, after eviction, and (δ) a *mala fide* possessor, were subject to the same rules as in the case of buildings fixed on land.

3. Accession of moveables to moveables.

1°. Writing on paper.

(1°.) Ownership.

Writing, too, although of gold, goes with the paper or parchment in like manner; just as all goes with the soil that is built on it or sown therein. And, therefore, if on your paper or parchment Titius has written a poem, a history, or a speech, the owner of this work is not Titius but you. (J. 2, 1, 33; G. 2, 77.)

(2°.) Compensation.

But if you claim your books or parchments from Titius, and are not ready to pay the expense of the writing, Titius will be able to defend himself by the plea of fraud; if, that is, it was in good faith that he obtained possession of those papers or parchments. (J. 2, 1, 33; G. 2, 77.)

This is the same principle as in the previous cases. A man writes on paper that he believes to belong to himself; it does not. He can resist the action of the owner, unless payment is made for the writing. It would seem, however, that if the owner had obtained possession there was no remedy. If the writer knew the paper did not belong to himself, then he could not complain of forfeiting his labour.

2°. Pictures.

If any one paints on a surface (*tabula*) that belongs to another, some think the surface goes with the picture; others that the picture, whatever it be, goes with the surface. But to us it seems better that the surface should go with the picture [an inversion of the usual rule, for which it is hard to give an adequate ground]; for it is absurd that a picture by Apelles or Parrhasius should go as a mere accessory to a most worthless surface. And hence, when the owner of the surface is in possession of the picture, if the painter claims it without paying the price of the surface, he can be repelled by the plea of fraud. If, again, the painter is in possession, it follows that a *utilis actio* against him will be given to the owner of the surface; and in that case, if the owner does not pay the expense of painting, he can be repelled by the plea of fraud—if, that is, the painter was a possessor in good faith. For it is manifest that, if the surface was stolen, whether by the painter or by some one else, the owner of the surface may bring an action for theft. (J. 2, 1, 34; G. 2, 78.)

It is at this point—pictures—that the doctrine of accession breaks down. Canvas can exist without the picture, but not the painting without the canvas; and therefore, logically, the canvas is the principal, and the colouring the accessory. But this result was too absurd. The value of the picture was in general so much greater than the worth of the canvas, that to have adhered to logical consistency would have involved a sacrifice of real justice. Gaius is at a loss to give a reason for the exception of pictures; and his only fault is, that he was not bold enough to disregard the merely logical distinction of principal and accessory in the case of writings also.

4. Accession of labour to moveables. (*Specificatio*.)

Hitherto the examples of accession have been instances of mere mechanical adhesion; but the same idea was applied where, by means of labour, raw material had been made to change its character, and become a new manufactured article. This is specification, or making a new article.

1°. Ownership.

When any finished article is made by one man out of material belonging to another, it is a common question which is the owner by natural reason? is it the maker, or rather the owner, of the material? If, for example, a man makes out of my grapes, or olives, or ears of grain, wine or oil or flour; or out of my gold or silver or bronze, some vessel; or mixes my wine and honey into mead, or uses my drugs to make up a plaster or eye-salve, or my wool to make a garment; or out of my timber frames a ship, a chest, or a seat;—[then is the product made out of my property his or mine? Some think we ought to look to the materials or substance; that is, that the owner of the materials is owner of the product. Such was the opinion of Sabinus and Cassius. Others hold that the product belongs to the maker; and this is the view taken by the authorities of the opposing school.] After the many doubts raised on both sides by the schools of Sabinus and Proculus, a middle opinion has been adopted. For it is held that if the finished product can be resolved into its materials, then the former owner of the materials is to be its owner; if it cannot be so resolved, then the maker rather is to be its owner. For instance, a vessel can be melted down and resolved into the original shapeless mass of bronze or silver or gold; while wine or oil or wheat cannot return to the earlier form of grapes or olives or ears of grain. But if a man makes any article partly out of his own materials, partly out of another's—out of his own wine, for instance, and another man's honey makes mead, or out of drugs partly his own and partly another's makes a plaster or eye-salve; or out of wool partly his own and partly another's makes a garment—there can be no doubt in this case that the maker is to be the owner; for he has not only given his work, but also supplied part of the materials. (J. 2, 1, 25; G. 2, 79.)

Merely disengaging the grains from the ear does not, however, constitute a new species. (D. 41, 1, 7, 7.)

2°. Compensation.

If, however, a man weaves purple belonging to another into a garment of his own, then, although the purple is the more costly, it goes with the garment

as an accessory. But the former owner has an action for theft against the man that stole it ; and also can bring a *condictio*, no matter whether he, or some one else, was the actual maker of the garment. For though things that have perished cannot be reclaimed (*vindicari*), yet a *condictio* may be brought against thieves, and against certain other possessors. (J. 2, 1, 26 ; G. 2, 79.)

If the specifier believed that the material belonged to him, he could not be sued for theft, but must give compensation.

Confusion or mixture. *Confusio, commixtio*. This is the case when things are mixed up without forming a new article.

If two different owners choose to mix their materials—if they mingle their wines, for instance, or melt down lumps of gold and silver together—then the whole product is owned by both in common. And if the materials differ in kind, and therefore a distinct sort of thing is made—as mead, for instance, from wine and honey, or electrum from gold and silver—still the rule of law is the same ; for in that case, too, it is undoubted that the finished product is owned in common. And if it was by chance, and not by the owner's choice, that the materials, whether different or of the same kind, were mixed, the rule is still held to be the same. (J. 2, 1, 27.)

If, now, Titius' wheat is mixed up with your wheat by your choice, the whole will be owned in common ; for the separate bodies—that is, grains—that belonged distinctively to each, have been brought into union by your choice. But if the mixture takes place by accident, or is Titius' doing without your choice, then the whole is not regarded as owned in common ; for the separate bodies retain their own nature. And by accidents such as those the wheat is no more made common than a flock would be if Titius' sheep were mixed up with yours. But if either of you two keeps the whole of the wheat, an *actio in rem* for his due share of the wheat is open to the other. And it falls within the province of the judge to determine, at his discretion, the quality of the wheat belonging to each of you. (J. 2, 1, 28.)

Confusio is generally used with reference to the mixture of liquids ; *commixtio*, of solids. The distinction taken is this : if the things are mixed by the consent of owners, the product belongs to them in common ; in other words, there is no room for accession. It is only when the consent of one of the owners does not exist, that a question of accession really arises. Then, if the things are inseparable, the ownership is in common ; if not, each retains his property in the things, and can sue by the ordinary action for the recovery of property—the *vindicatio*. (D. 6, 1, 5, 1 ; D. 6, 1, 3, 2.)

II.—DELIVERY (*Traditio*).

From what we have said it appears that alienation takes place sometimes by the *Jus Naturale*—as, for instance, by delivery : sometimes by the *Jus Civile*, as in *mancipatio*, *in jure cessio*, and *usucapio*, the right to which is peculiar to Roman citizens. (G. 2, 65.)

By delivery also, according to the *Jus Naturale*, we acquire property. For nothing is so agreeable to natural fairness as that the wish of the owner that wishes to transfer what is his to another, should be held valid. Corporeal things, therefore, of whatever kind, can be delivered, and by delivery be alienated from the owner. (J. 2, 1, 40.)

The subject will be considered as follows:—

1. The conditions necessary to acquisition by delivery.
 - 1°. Change of possession.
 - 2°. Intention to transfer ownership.
 - 3°. (In case of contract of sale), payment of the price.
2. Restrictions on delivery.

1. The conditions necessary to acquisition by delivery.

1°. Transfer of possession. The transferrer must put the transferee in a position to deal with the thing to the exclusion of everybody else. This might be accomplished in various ways.

(1°.) The most obvious is the actual transfer of physical possession. (D. 6, 1, 77.)

Illustrations.

A agrees to allow his friend B to take stones from his quarry. From the moment the stones are severed from the rock, they belong to B. After some are quarried, A and B have a dispute, and A forbids B to carry the stones away. The prohibition is vain, because B is the owner of the stones: but A may forbid B taking out any more. (D. 39, 5, 6.)

A buys land from B, and pays the land-tax. This does not constitute delivery, and B remains owner. (C. 4, 49, 8.)

(2°.) Without actual change of possession, delivery might be effected by placing the thing within view of the transferee, and declaring that he may take possession. (D. 41, 2, 1, 21.) This is called delivery *longa manu*.

Illustrations.

A owes B a sum of money or some moveable, which, at B's request, he places within B's sight, with the intention of transferring the possession. It is not necessary that B should touch the money; he becomes owner of it at once. (D. 46, 3, 79.)

A sells to B an estate of land, and showing it to B from a neighbouring height, declares that he surrenders free and undisputed possession. This is a delivery of the land to B. (D. 41, 2, 18, 2.)

A makes a gift to B of land with slaves thereon, and declares in writing that he has delivered possession. In point of fact he had not. B then fails to acquire the ownership. (D. 41, 2, 48.)

(3°.) Delivery of the keys of a house is a mode of delivering either the house itself or its contents. Thus, the owner-

ship of wine is transferred by giving up the keys of the cellar in which it is kept. (D. 41, 2, 1, 21.)

And again, if a man sells valuables deposited in a warehouse, as soon as he delivers the keys of the warehouse to the buyer he transfers the property in the valuables to the buyer. (J. 2, 1, 45.)

There is a question whether the delivery of the keys must be at the place. In one passage only is the affirmative expressly asserted (*si claves apud horrea tradita sunt*). (D. 18, 1, 74.) There does not seem much reason in requiring such an inconvenient limitation. It would be hard, however, to pronounce any very decided opinion on the subject.

(4°.) Akin to the foregoing is delivery by putting marks, as upon logs of wood. (D. 18, 6, 14, 1.) If, however, the purpose in marking any object is simply to prove its identity, and not to transfer the possession or ownership of it, there is no delivery. Thus wine-jars may be marked for the purpose of identification, without effecting any transfer of possession. (D. 18, 6, 1, 2.)

(5°.) Deposit of a thing in the house of the transferee was another mode of effecting delivery. (D. 23, 3, 9, 3; D. 47, 10, 5, 2.) It was not necessary that the owner of the house, or any one on his behalf, should have actually touched the thing. (D. 41, 2, 18, 2.)

(6°.) Delivery *brevi manu*.

Sometimes, too, without delivery, the bare wish of the owner is enough to transfer the property; as when a man lends it, or lets it out to you, or deposits it with you, and then sells it or gives it to you. For although it was not on that ground that he delivered it to you, yet by the very fact that he suffers it to become yours the property in it is at once acquired by you, just as if it had been delivered on that account. (J. 2, 1, 44.)

(7°.) Delivery by transfer of title-deeds. It is stated in a constitution of Severus and Antoninus (C. 8, 54, 1), that a gift and delivery of the title-deeds of slaves were equivalent to a gift and delivery of the slaves themselves. If this be taken as a fair and complete statement of the law, it would be an extreme instance of symbolical delivery. Savigny and others contend with great vehemence that the text is incomplete, and that it must be understood as implying that the slaves were in the presence of the parties at the making of the gift. According to the view of these authors, the case stated is an example of delivery *longa manu*. There is some difficulty in acquiescing in this opinion, inasmuch as it attributes the operative part of the transfer to something not mentioned in the

text, and denies any effect to the words that profess to give a complete account of the transfer.

Except by delivery, in the time of Justinian, property could not be conveyed. A mere agreement without delivery of possession, even if in writing, did not operate as a transfer of ownership.¹ (C. 3, 32, 27.)

But to this rule several exceptions existed. (See *Servitus*, *Hypotheca*, *Societas*.)

At no period in Roman Law was a written document attesting a delivery necessary; but such documents were commonly made as a sure record of the fact. (C. 7, 32, 2; C. 4, 38, 12.)

It may be added that a delivery never gave the transferee any greater right than the transferor possessed.² (D. 41, 1, 20, pr.) Hence land subject to a right of way passes to the transferee burdened therewith. (D. 40, 1, 20, 1.)

2°. The delivery must be made with an intention to transfer the ownership. That, but nothing more, was required. It was not necessary that there should be any consideration, any *quid pro quo*, for the transfer. Usually, however, some consideration existed, and the delivery took place in consequence of a previous contract of sale (*pro emptore*), or legacy (*pro legato*), or bargain for a dowry (*pro dote*), or in payment of a debt (*pro soluto*); but there need be nothing more than a purpose of liberality (*pro donato*). The Roman jurists expressed the relation of such facts to delivery in a somewhat peculiar way. They said that mere delivery (*nuda traditio*) was not a transvestitive fact of ownership, unless supported by what they called a *justa causa* or *justus titulus*. A *justa causa* was one of the circumstances above mentioned—sale, legacy, dowry, payment of debt, or free gift. It is more accurate to say that these are simply facts from which an intention to transfer ownership may properly be inferred.

If A delivers a ring to B, there is no presumption that B is owner; but on proving that the ring was bequeathed to B by a testator to whom A is heir, the nature of the transaction becomes at once apparent. Again, if it is proved that A intended to make a gift of the ring to B, the meaning of the transaction becomes clear. If, on the other hand, the ring was given to B in loan, or for safe custody, the conclusion would be that A

¹ *Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur.* (C. 2, 3, 20.)

² *Nemo plus juris ad alium transferre potest quam ipse haberet.* (D. 50, 17, 54.)

remained owner, and that the delivery of the thing did not transfer the ownership to B.

The exposition of the Roman jurists is better suited to a practical lawyer than to a student of jurisprudence. In proving ownership, what a Roman lawyer had to consider was the delivery of possession, and a *justa causa*, i. e. one of the facts that conclusively proved an intention to transfer. The real potent element is not the change of possession, but the intention of the owner to transfer his property; the delivery is merely a mode of unequivocally attesting the change; it marks the precise moment when a mere intention or obligation to deliver the ownership passes into an actual transfer of the ownership.

The intention to transfer the ownership must exist at the time that delivery is made. Thus, if a person sold a slave that he knew to belong to another, but the slave was not delivered until the owner had ratified the sale, the delivery transferred the ownership. (D. 41, 3, 44, 1.)

Nay, further, sometimes the wish of the owner, though its object is an indeterminate person, transfers the ownership of property. Praetors, for instance, or Consuls that throw gifts among the crowd, are ignorant what each member of the crowd is going to catch. And yet because it is their wish that what each catches should be his, they make him owner on the spot. (J. 2, 1, 46.)

3°. Delivery does not transfer ownership (in the case of a contract of sale) until the price is paid.

If things are given by way of a gift or a dowry, or on any other ground, they are undoubtedly transferred. But things sold and delivered are not acquired by the buyer until he has paid the seller the price, or in some other way satisfied him, as by getting a surety or giving a pledge. This is indeed a provision in the statute of the XII Tables; and yet it is rightly said to be brought about by the *Fus Gentium*, that is the *Fus Naturale*. But if the seller is willing to give it to the buyer on credit, then it must be said that the thing sold becomes at once the property of the buyer. (J. 2, 1, 41.)

According to the construction put upon sale by the Roman Law, the seller was understood not to intend to part with his property until he had got his money. If before receiving the price, or accepting something in lieu of it, he delivered the thing, he was understood to have done so without the intention of transferring the ownership. If the goods were sold on credit, the seller was regarded as parting with the ownership in confidence that the buyer would pay him, electing to accept a right *in personam* as against the buyer, instead of retaining his right *in rem* to the thing. The exceptional character of sale in regard to delivery is thus apparent, and not real. The intention to part with the ownership was held not to attach to the fact of agreement for sale, but to the fact of payment; and hence, in the language of the Roman writers, sale was not a *justa causa* unless coupled with payment of the price. In other cases, as in gift, dowry, &c., the transfer of ownership coincided with the delivery of possession.

There was another peculiarity in the Law of Sale. When the title of the purchaser was completed by the delivery to him of the thing sold and the payment of the price, his ownership was regarded as dating not from the delivery or payment, whichever happened last, but from the date of the contract. The delivery and the payment had a retroactive effect, and made the buyer practically owner from the date of the sale. Now, as sale is a contract formed by consent alone, the date of the sale is the moment when the thing to be sold and the price to be paid for it were agreed upon. (C. 4, 48, 1; D. 18, 6, 8.) The evidence of this retroactive effect is clear. In the first place, the buyer was entitled to all the produce and accessions (*fructus et accessiones*) of the thing from the date of the sale; and (2) if the thing perished without fault imputable to any one, the loss fell entirely on the buyer.

(1°.) The buyer was entitled to all the produce and accessions of the thing sold from the date of the sale, as the work of slaves, the offspring of slaves or animals, and all fruits not gathered. (Paul, Sent. 2, 17, 7.) Also, any inheritance or legacy given to a slave belongs to the buyer (D. 19, 1, 13, 18; D. 28, 5, 38, 5); and he alone has the right to sue for harm done to the property. (D. 19, 1, 13, 12.) But if it were agreed between the buyer and seller that the seller should have the produce until the thing sold was delivered, then the sale had no retroactive effect. (Vat. Frag. 15.) In such a case the buyer would be free if the thing perished or were lost before delivery. (D. 50, 17, 10.)

(2°.) The property sold remained at the risk of the buyer from the date of the sale (*periculum rei*). (C. 4, 48, 4; D. 18, 6, 7.)

When once the contract for purchase and sale is made (and this is fully done, as we have said, as soon as the price is agreed on, if the business is transacted without writing), the thing sold is at the buyer's risk, although not yet delivered to him. Therefore, if the slave dies or is injured in any part of his body, if the house is either in whole or in part consumed by fire, if the field is either in whole or in part borne away by the violence of a river, or by reason of a flood or a whirlwind that dashes the trees to the ground, is lessened or changed for the worse—in all these cases the loss falls on the buyer, and he must needs pay the price although he has not obtained the property. For all that befalls it, without fraud or negligence on the seller's part, leaves the seller free from responsibility. And if, after the purchase is made, any addition is made to the field by alluvion, that is the buyer's profit: for he that runs the risk ought to have the profit. (J. 3, 23, 3.)

If, however, a slave that has been sold runs away or is stolen, without any fraud or negligence on the seller's part coming in, we ought to look carefully

whether the seller undertook to guard him till delivery. For certainly if he did, the risk of such an accident lies with him ; if he did not, he will be free from responsibility. And so too with all other animals and things. The seller's action to reclaim the property, and his *condictio*, he must make over to the buyer ; because certainly he that has not yet delivered the property to the buyer is still himself the owner. (J. 3, 23, 3A.)

Illustrations.

Lucius Titius bought lands in Germany, and paid a part of the price. He died, and his heir was sued for the residue of the price. His heir pleaded that the lands by a decree of the Emperor had been partly sold and partly given to veterans as prize. But Paul said this was no defence. The eviction was not due to anything existing at the date of the sale, but to a subsequent act of the sovereign ; and therefore the loss fell on the buyer, who, although he could not get his lands, must still pay the price he promised. (D. 21, 2, 11.)

Titius sells his slave Stichus, along with his *peculium*, to Gaius. Before Stichus is delivered to Gaius, he steals from Titius property that is not recovered. Gaius must suffer the loss, and Titius may deduct the amount stolen from the *peculium*. (D. 19, 1, 30.)

If, however, the parties agreed that the thing sold should remain at the risk of the seller (D. 18, 1, 78, 3; D. 18, 6, 1), their agreement was binding. But, independently of the agreement of the parties, in certain cases the risk remained with the seller.

(1°) When the things sold were fungible (*res fungibiles*), i. e., dealt with by number, weight, or measure (*res quae pondere, numero, mensura consistunt*). In this case the principle is the same, but the date of the liability of the buyer is altered. It is not the date of the sale, but the time when the things are actually weighed, numbered, or measured, that fixes the liability. (D. 18, 1, 35, 5; D. 18, 1, 35, 7.) If, however, fungible things are sold *en bloc* (*per aversionem*, D. 18, 1, 62, 2) as, "all that lot of wine, or oil, or corn," they are at the peril of the buyer from the date of the sale, for such a contract differs in no respect from a sale of land or houses. (D. 18, 6, 1; D. 18, 6, 4, 2.)

Illustrations.

Wine sold becomes sour. If the wine was sold *en bloc*, the loss falls upon the buyer ; but if the agreement was for so many *amphorae* (not specifying which), the loss falls upon the seller, unless the *amphorae* had been selected. (Vat. Frag. 16.)

If a flock is sold for one sum, the loss falls on the buyer from the date of the sale : if at so much a-head, then only from the time they are selected. (D. 18, 1, 35, 6.)

(2°) When the sale is conditional, i. e., depends on some event future and uncertain, the rule is somewhat more complex. If the thing sold perishes altogether before the event occurs, the seller suffers the loss ; if it does not perish wholly, but is impaired

or deteriorated, the loss falls on the buyer. (D. 18, 6, 8, pr.; C. 4, 48, 5.) The reason is that, if the thing does not exist when the event happens, the seller cannot fulfil his obligation, because there is nothing for him to deliver; but if the thing exists in however bad a state, he can deliver it, and acquit himself of his promise.

(3°.) If the agreement were that the buyer should have the choice of two things, and one perished, the buyer could select the other; if both perished, he must pay the price. (D. 18, 1, 34, 6.)

2. Restrictions on delivery.

1°. There is a great difference between *res mancipi* and *res nec mancipi*. For the latter can be transferred by bare delivery to another, if only they are corporeal, and so admit of delivery. (G. 2, 18, 19.)

Therefore, if I deliver to you a garment, or gold, or silver, whether by way of sale or gift, or on any other lawful ground, the thing becomes yours without any legal formality. (G. 2, 20.)

And so too with landed property in the provinces, whether it pays taxes or tribute. Now, lands that pay taxes (*stipendiaria*) are in the provinces that belong peculiarly to the Roman people. Lands that pay tribute are in the provinces that belong peculiarly to the Emperor. (G. 2, 21.)

Tax-paying and tributary lands accordingly are alienated in the same way. Now the lands so called are provincial; and between them and Italian lands there is now under our constitution no difference. (J. 2, 1, 40.)

2°. Incorporeal things clearly do not admit of delivery. (G. 2, 28.)

Some things, besides, are corporeal, some incorporeal. Corporeal things are those that by their nature can be touched—a farm, for instance, a slave, a garment, gold, silver, and in short other things beyond number. Incorporeal again are those that cannot be touched, such as those that consist in a right, as an inheritance, a usufruct, a use; or obligations in whatever way contracted. And it is not to the point to object that an inheritance includes corporeal things. For the fruits, too, that are reaped from a farm are corporeal; and what one owes us under some obligation is often corporeal, as a farm, a man, a sum of money. But the actual right of inheritance, the actual right of usufruct, and the actual right under the obligation, are incorporeal. (J. 2, 2, pr., 1, 2; G. 2, 12, 13, 14, as restored.)

The totality of rights constituting ownership (*dominium*) is as much incorporeal as the portion of those rights constituting usufruct or servitude. But it pleased the Roman jurists to say that when the whole was conveyed, delivery should be necessary, while, if a part only were conveyed, delivery should be unnecessary. Delivery is therefore a mode of conveying the ownership, as opposed to those lesser rights in things, called usufruct, servitude, and the like. The restriction of delivery to corporeal things marks a real distinction, although it is expressed in a phraseology that admits of improvement.

III. PRESCRIPTION. (*Possessio longi temporis*.)

The investitive fact of *usucapio* was limited in its application.

As belonging to the civil law, it operated only in favour of citizens, and of those Latins and others that had the *commercium*. It did not apply to lands out of Italy, nor, with certain exceptions, to servitudes. The Praetors supplied those defects of *usucapio* by the theory of possession for a long time. According to Ortolan, this long possession was of a different character from *usucapio*. He says *usucapio* is positive prescription, long possession is negative prescription. Long possession was a plea in defence (*praescriptio, exceptio*), by which the demand of the plaintiff could be resisted. (C. 7, 39, 8; D. 8, 5, 10.) This is, however, a very different thing from negative prescription.

In two ways a right of ownership may be effectually destroyed—either by the acquisition of an adverse right by another, or by denying the owner an action after a certain length of dispossession. If the latter course is adopted, and the form of the law is—after so many years no action shall be brought—then it is immaterial whether the actual possessor has or has not had it during the whole of that time, or whether he believes it to be his property, or knows that it is not. This plan seems the simplest and most efficacious. But the prescription or defence of long possession in the Roman Law was founded positively on the adverse rights of a *bona fide* possessor. A *bona fide* possessor after a certain length of time was confirmed in his title, as against not only the owner, but all the world. The prescription of long possession was therefore very different from a statute of limitations, and was based on the claims of the possessor, not on the default of the owner. It was, therefore, in essence the same as *usucapio*.

1. Comparison of *usucapio* and *possessio longi temporis*.

(1.) Prescription supplied the deficiencies of *usucapio*. Inasmuch as *usucapio* was a mode of acquiring Quiritarian ownership, it followed that whatever was not an object of that species of ownership was not susceptible of *usucapio*. Hence lands out of Italy, of which the State retained the ownership, could not be acquired by *usucapio*, because no private person could be owner of them. But, subject to the claims of the State, the possessors of those lands were virtually owners, and for this important class of property the Praetors and Emperors devised long possession as an equivalent for *usucapio*. Servitudes also were held to be excluded from *usucapio* after the *lex Scribonia*; but they were capable of being acquired or lost by long quasi-possession. Moveables also belonging to cities fell under twenty years'

prescription. (Paul, Sent. 5, 4, 4; D. 44, 3, 9; C. 7, 34, 2.) (2.) *Usucapio* was for two years in immoveables, and one year in moveables. Long possession was for ten years if plaintiff and defendant lived in the same province, twenty years if they lived in different provinces. (Paul, Sent. 5, 2, 3.) But although the time differed, the principle was the same. The object was to allow an owner time enough to see to his rights. In early times, two years was no doubt an ample allowance; but when the confines of Rome extended over Europe and Asia, a very much longer time was necessary.

(3.) *Usucapio* gave ownership, with all the burdens attached to it. Thus if the land were mortgaged, the two years' possession gave the occupant the title of owner, subject, however, to the mortgage. In the same way, he took the land burdened with whatever servitudes were attached to it. But long possession availed against both things, if no claim was asserted under them within the specified time. After ten or twenty years of non-claim, a mortgage or servitude was extinguished. (C. 7, 36, 2; C. 7, 36, 1; D. 44, 3, 12.)

(4.) A minor distinction, of no practical moment, is that *usucapio* was not cut short by the *litis contestatio*, but only by judgment, although the judgment decided according to the rights of the parties as fixed by the time of the *litis contestatio*. But possession is at once stopped by the *litis contestatio* (C. 7, 33, 2), although not by mere notice of adverse title of owner. (D. 41, 4, 13.)

2. Change by Justinian.

The *Jus Civile* established the rule that when a man in good faith bought a thing, or received it as a gift, or on some other lawful ground, from another that was not the owner, in the belief that he was the owner, then he might acquire that thing by use. And the time fixed was for a moveable anywhere one year; for an immovable two years, but on Italian soil only. The aim of this was that the ownership of property might not be uncertain. When this policy was decided on, the ancients thought the times named above were enough for the owners to look after their property; but we have deliberately come to a better opinion. And, therefore, lest masters should be despoiled of their property by undue haste, and lest this boon should be limited to a fixed locality, we have published a constitution on this subject. It provides that moveables may be acquired by use for three years, immovables by long possession—ten years, that is, for persons present, twenty for persons absent. And in both these ways, not only in Italy, but in every land swayed by our rule, the ownership of property may be acquired, if only the antecedent ground of possession was lawful. (J. 2, 6, pr.)

To this prescription the old characteristics of *usucapio* attach. It confers the ownership (*dominium*), and it required the old conditions of *bona fides* and *justus titulus*.

Parties were said to be "present" when they both had their domicile in the same province; "absent" if in different provinces (C. 7, 33, 12); and if they were domiciled partly in the same province and partly in different provinces, the time required was ten years, counting each two years of absence as one of presence. (Nov. 119, 8.)

RESTRICTIONS ON INVESTITIVE AND TRANSVESTITIVE FACTS.

(A.) PERSONS TO WHOM THE OWNERSHIP OF THINGS CANNOT BE GIVEN.

I. SLAVES. — Slaves, as we have seen, had originally no rights in respect of their own person; much less, then, in respect of external things. But although a slave could not be owner, nevertheless alienations of property made to him were not void. The slave was regarded as a conduit pipe, through whom acquisitions might flow to the master. Whenever anything was transferred to a slave in such a manner that if he were free he would be owner of the thing, his master became owner of it. (J. 1, 8, 1.)

PECULIUM of the slave.

There grew up, however, under the sanction of custom and public opinion, a *quasi* right of property. Masters found it for their interest not to exact the uttermost farthing—not to strip their slaves in all cases as completely bare of things they could call their own as the law allowed. By leaving the slave a margin of his earnings, which he could by great industry increase, his total earnings would be so much augmented that the master would even profit by the remission. Slaves did a great portion of the intellectual as well as the manual work of Rome; and it was found expedient to reward their zeal and fidelity by allowing them the enjoyment and control of property. Whatever was thus allowed them was called *peculium*. It consisted of the savings made by a slave, or of presents given to him in reward of his services, and which his master was willing he should keep as his own property. (D. 15, 1, 39.) *Peculium* is a diminutive form of *pecunia*, indicating the trifling importance of its amount. (D. 15, 1, 5, 3.) The *peculium* might consist of land or moveables, or other slaves (in that case called *vicarii*), claims arising from contract (*nomina*), etc. (D. 15, 1, 7, 4.) Necessaries that the master was bound to supply were not considered part of the *peculium* (D. 15, 1, 40); but even clothes might be in the *peculium* if they were given to the slave for his perpetual and exclusive use, and therefore to be kept solely by him. But clothes given by the master for a certain purpose, or to be used only at stated times, as when

serving at supper, were not included in the *peculium*. (D. 15, 1, 25.) Everything, however, turned on the intention of the master. If he intended to surrender to the slave the exclusive control and enjoyment of anything as his *quasi* property, then it was *peculium*; otherwise not.

What was the legal character of a slave's interest in his *peculium*? It must be remembered that a slave had no rights; he could not sue either his master or any other person; but for many purposes his acts bound his master. Thus, he might enjoy the power of alienation. This was not considered an essential right of the *peculium*. (D. 15, 1, 7, 1.) A slave's garments might be treated as *peculium* to the extent of exclusive custody and use, but not for the purpose of alienation. If, however, the master allowed the slave free administration of his *peculium*, the slave could alienate any portion of it without the consent of the master. (D. 15, 1, 46.) If the slave had not obtained full administration, and sold anything out of the *peculium*, the buyer did not become owner. If the buyer did not know that the seller was a slave, he had *bona fide* possession, which might ripen by *usucapio* into ownership. (C. 4, 26, 10.) The power of pledging a thing goes along with, and is included in, the general power of alienation. (C. 4, 26, 6.) As we shall afterwards see, the *peculium* was liable for the debts contracted by the slave, and for all damages arising out of his contracts.

The consent of the master and the delivery of the thing to the slave (unless it was already in his possession) created the *peculium*. (D. 15, 1, 8; D. 15, 1, 4.) So the expressed intention of the master to put an end to the *peculium* at once destroyed it even without the necessity of redelivering the things to the master. (D. 15, 1, 40.) The *peculium* was also extinguished if the slave ran away or was stolen, or if nobody knew whether he was alive or dead. (D. 15, 1, 48.)

II. PERSONS UNDER THE *POTESTAS*. *Filiusfamilias*, *filiæfamilias*.

A *filiusfamilias* was exactly in the position of a slave as regards property; whatever would have been acquired by him through any investitive fact, if he had been independent, became the property of his *paterfamilias*. But by degrees the *filiusfamilias* obtained some rights of property, although never in Rome to the extent generally admitted in modern systems of law.

1. *Peculium*. The first mitigation was to allow the *filiusfamilias* to enjoy *peculium* on the same terms as a slave.

(D. 15, 1, 1, 4.) Beyond this stage no improvement was made in his lot during the Republic. A *filiusfamilias*, in the time of Cicero, even had he filled every office up to the consulship, or had, like Cincinnatus, twice saved the State, was not capable of, in the true sense of the word, *owning* the smallest coin current in Rome.

2. *Peculium castrense*. For the first time, under Caesar or Titus, a soldier *filiusfamilias* was partially relieved from his proprietary disability in respect of certain acquisitions. The property that he was allowed to enjoy was called *peculium castrense*, and it may be defined as consisting of whatever he obtained by gift from his parents or relatives for his equipment, or himself acquired on service and by service. (D. 49, 17, 1.)

Illustrations.

Immoveables presented by a father to his *filiusfamilias*, a soldier on service, are not part of his *peculium castrense*, because they have no connection with his service. But immoveables gained by the son as prize of war are part of his *peculium castrense*. (C. 3, 36, 4.)

All that the *filiusfamilias* carries with him to war, with the consent of his *paterfamilias*, is *peculium castrense*. (D. 49, 17, 4.)

Two comrades in war make a fast friendship, and one leaves to the other his property by will. This is part of the *peculium castrense*. (C. 12, 37, 4 ; D. 49, 17, 19, pr.)

An inheritance left by the wife of a *filiusfamilias* on service was decided also to be in his *peculium castrense* (D. 49, 17, 16, pr ; D. 49, 17, 13) ; rightly if the inheritance was given as a sort of prize of valour ; but when no such motive could be assigned, the inheritance did not go to the *peculium castrense*. (D. 49, 17, 16, 1.)

The dowry given to a *filiusfamilias* with his wife is not part of his *peculium castrense*, because it is got by marriage, not by service on the field of battle. (D. 49, 17, 16, pr.)

A friend of a *filiusfamilias* bequeathed to him a house, and expressly stated in his will that it was to form part of the son's *peculium castrense*. This declaration has in itself no efficacy. If upon the facts, apart from that statement, the legacy would be held not to fall into the *peculium castrense*, no effect was given to the declaration. (D. 49, 17, 8.)

In respect of his *peculium castrense* a son is absolute owner, and he can deal with it as freely as if he were not under the *potestas*. He can receive such property (D. 49, 17, 5), and sue for it in a court of justice even against the expressed wishes of his *paterfamilias*. (D. 49, 17, 4, 1.)

3. *Peculium quasi-castrense*. By successive enactments the privilege conferred on soldiers of retaining their prizes and equipment in full ownership was extended to persons engaged in the higher civil offices. Constantine (A.D. 320) enacted that the officials attached to the Imperial Palace (*Palatini*) should be

owners of what they saved out of their salary, or obtained as gratuities from the Emperors, just as in the case of *peculium castrense*. (C. 12, 31, 1.) Theodosius and Valentinian extended the privilege to the officials of the Praetorian Prefect, clerks in the Chancery Court (*exceptores*), and the keepers of records (*scrinarii*). (C. 12, 37, 6.) Theodosius II. and Valentinian III. (A.D. 440) seem to have given a wider sweep to the privilege in the case of advocates of the Praetorian Court or the Court of the City Prefect, giving them exclusive property in whatever they acquired from any source. (C. 2, 7, 8.) Leo and Anthemius (A.D. 469) allowed bishops, presbyters, and deacons free and full control over their clerical incomes. (C. 1, 3, 34.) To this list Justinian, with his greater zeal for the clergy, added sub-deacons, singers (*cantores*), and readers (*lectores*), giving to the clergy of every grade independent ownership over everything they acquired, thus rendering them, in regard to property, quite free from the most characteristic right of the *potestas*. (Nov. 123, 19.) Justinian also, it must be remembered, released bishops from the *potestas* altogether. (Nov. 81.) He had previously decided in the Code that all gifts from the Emperor or Empress were to be the separate property of the receiver, free from the *potestas*. (C. 6, 61, 7.)

4. *Peculium adventitium*. The proprietary disabilities arising from the *potestas* were broken in upon on another line. The rights of the father were limited with respect to property coming to the children from their mother by her last will, or on her death intestate. It seemed natural that the property held by a wife independently of her husband should not become his by her attempting to give it to her children. Constantine (A.D. 319) enacted that a father should have only a life-interest (*ususfructus*) in the property acquired by his children from their mother by her testament, or on her death intestate. The father was bound to manage it with all care, and could not sell it to a purchaser, so as to give him a title even by prescription. (C. 6, 60, 1.) Arcadius and Honorius (A.D. 395) extended the rule to property coming from the maternal ancestors beyond the mother, and whether by gift during life or by will. (C. 6, 60, 2.) Theodosius and Valentinian (A.D. 426) gave only a usufruct to the father in the property that a son got through his wife, or a daughter through her husband. (C. 6, 61, 1.) Lastly, Justinian extended this limited ownership to all acquisitions of the son, except those made from the father's property.

Our children of both sexes in our *potestas* in old times indeed acquired for their parents all that came to them (except, it is true, *castrense peculium*) without any distinction. And this became the property of the parents so absolutely that they might at pleasure take what one son or daughter had acquired and give it to another son or to an outsider, or sell it, or apply it in any way they wished. This seemed to us harsh; and therefore, by a general constitution promulgated by us, we have both spared the children and reserved due rights to fathers. For the law as ratified by us stands thus:—If anything comes to the child from the father's property,¹ this, according to ancient usage, he is to acquire wholly for the parent; for what hardship is it that what came because of the father should return to the father? If, again, the son acquires anything for himself in any other way,² the usufruct in this indeed he is to acquire for his father, but the ownership is to remain with himself; lest what his own toil or good fortune has added to his store, should, by passing on to another, prove only a grief to him. (J. 2, 9, 1.)

Another change made by Justinian may be noticed. Constantine allowed a father on emancipating a child to retain a third of his property; but Justinian changed the rule as follows. (C. 6, 61, 6, 3.)

And we have made this arrangement also with regard to that class of cases where the parent, on emancipating the child, retained, if he wished, a third part of all the property that escapes acquisition by him. For under the earlier constitutions he had this privilege—the price, as it were, in a way, to be paid for the emancipation. Now it seemed harsh that the son should, as the result of his emancipation, be defrauded in part of the ownership of his property, and thus by the lessening of his effects lose all the honour conferred upon him by the fact that his emancipation made him *sui juris*. And therefore we have resolved that the parent, instead of the third of the goods that he was able to keep as owner, shall keep the half of the goods, not as owner, but in usufruct. For so the son's property will remain with him untouched, while yet the father will enjoy a larger amount in coming to control not a third, but a half. (J. 2, 9, 2.)

III. WIVES IN *MANU* and FREE PERSONS IN *MANCIPIO* were subject to the same proprietary disabilities as slaves or *filiifamilias* (G. 2, 86), and like these a wife could have *peculium*. But the institution of the *manus* disappeared so early that scarcely any interest attaches to it in respect of the law of property. Under the system of free marriage that took the place of *manus*, a proprietary institution of great historical interest and importance grew up. This was the dowry (*dos*), or contribution made by a wife's family for her support during the time of her marriage. At a late period in the Empire a corresponding contribution

¹ Hence called *peculium profectitium*, because arising from (*proficiens*) the father's property.

Hence called *peculium adventitium*.

was sometimes made by the family of the husband (*donatio propter nuptias*), and that we may consider in connection with the dowry.

D O S.

DEFINITION.

Dos is the property contributed by a wife, or by any one else on her behalf, to her husband, to enable him to support the expenses of the marriage. This definition includes the only essential feature of the *dos* that need at this stage be considered.

Parapherna was that part of a woman's property that she reserved from the *dos*. The husband had no right to interfere with it or to burden it. (C. 5, 14, 8.) The practice was for a wife to make out an inventory (*libellus*) of the property she intended to use in her husband's house, and which was not to be in her *dos*, and to preserve the document after obtaining her husband's signature to it. The husband had no right to such reserved property; and if he retained it, the wife could sue him by the same actions that she could bring against any other person. (D. 23, 3, 9, 3.)

RELATION OF THE *DOS* TO THE *MANUS*.—The *dos* is an institution of considerable antiquity. It is referred to by Cicero (Top. 4) in a manner that would seem to show that it was better understood than the *manus*; and it was of such importance that Servus Sulpicius Rufus, who was consul B.C. 49, and died B.C. 42, wrote a book on the subject. That book is lost; but Aulus Gellius makes a statement, as from the work of Rufus, that securities for the restitution of the *dos* on the dissolution of marriage were first required when Sp. Carvilius Ruga put away his wife, by command of the censor, for barrenness. There is nothing incredible in the statement that about 200 years after the Decemviral Legislation the *dos* should have been in existence, as the XII Tables contained a provision by which married women were enabled to escape subjection to the *manus*. The facts, indeed, show that the decay of the *manus* began at an exceedingly early period; or, to speak more accurately, the *manus* never, within the time covered by written records, existed with all the attributes that we must regard as originally inherent in it. The powers of a husband over his wife's person, at least such powers as he had over his children (and we must remember that in law the wife was a daughter), seem to have been reduced almost to nonentity from the earliest dawn of history. It was natural that the emancipation of the wife's person should precede by a considerable interval the emancipation of her property.

The interesting feature in the history of the wife's release from the disabilities of the *manus* is its abruptness, as compared with the liberation of children from the shackles of the *potestas*. We have traced the steps by which property gained in certain specific ways was withdrawn from the *potestas*, and the rights of the *paterfamilias* were ultimately reduced to a usufruct or life-interest, leaving the capital wholly to the children. Very different was the history of the *manus*. A woman was either wholly in or wholly out of the *manus*; either in law the daughter of her husband, subject to his absolute power in regard to contract and property, or free and independent, capable of bargaining with him on equal terms. Was the transition from one condition to the other abrupt? Did the Roman matron emerge at once from slavery and become the equal of her husband? That seems improbable; and we are left to conjecture by what steps the great change was accomplished.

It is probably safe to assume that a wife ceased to be regarded as property when her husband obtained her from her friends without paying for her. A state of the law that was in perfect harmony with the buying of wives, must offend the sense of propriety when marriage was entered into on equal terms. When we come to the Decemviral Legislation, we find no clear evidence of the real purchase of wives, although the form of marriage by sale continued long to exist. The time had therefore come when the relation of husband and wife in regard to property should be determined by the existing moral standard, and not by an ancient theory surviving merely in a legal formality. The *manus* must yield to the *dos*.

If we may hazard a conjecture, the *dos* was at first perhaps scarcely distinguishable from the *manus*. When a wife married without the form of *confarreatio* or *coemptio*, her husband had no legal right to her property; but if she remained with him a year, and did not stay away three nights, she passed under his *manus*. Perhaps the first bargains were that the husband should have certain property in place of the *manus*. Whether this ever existed as a distinct stage we know not, but another step in advance, and we are on sure ground. The father gives certain property to the husband to support the wife, on condition that if he (the father) survives the wife, he shall recover from the husband as much as he gave him on the marriage. During the Republic, the husband (even in the absence of the *manus*) was absolute owner of all the wife's

property given to him, subject to an obligation to return the property if the wife should die, leaving her father to claim it. It was not until the Empire that the process was effectually begun that ended in depriving the husband of the character of owner, making him in substance a trustee, with the privilege of taking the annual produce of the property during the continuance of the marriage.

1. *Dos profectitia* is the contribution made by the wife's father, or other ascendant on the male side, to the husband for the support of the wife. (D. 23, 3, 5, pr ; D. 23, 3, 5, 13 ; D. 23, 3, 5, 1 ; D. 23, 3, 5, 6.)

2. *Dos adventitia* is the contribution made by the wife herself, or by any one else except her father, or other ascendant on the male side. (C. 5, 13, 1.)

3. *Dos receptitia* is the contribution made by any one under (2), with the express agreement that the property shall be returned to such person on the dissolution of the marriage.

RIGHTS AND DUTIES.

A. Rights of the Husband.

I. To the *corpus* of the property.

A distinction must be drawn between permanent and perishable property. As regards fungible things—*i. e.*, things dealt with by weight, number, or measure (*quae pondere, numero, mensura constant*)—the property is given absolutely to the husband, subject to an obligation to return the same kind of things and the same quantities, in certain events, on the termination of the marriage. (D. 23, 3, 42.) Thus, if money is given to the husband, it is simply a loan without interest ; he has the use of the money until the end of the marriage, with the chance of never having to restore it.

But even in the case of things that admit of being used, and returned after the marriage, as land or slaves, if the husband had the option of returning the things or paying a fixed price, he was absolute owner ; and if the property were accidentally destroyed, the loss fell entirely upon him. (C. 5, 12, 10.) In this case the property is said to consist of *res aestimatae*. (C. 5, 12, 5.) But if it were agreed that the wife, not the husband, should have the option of taking back the things, or their value, the husband did not acquire the uncontrolled ownership. (C. 5, 23, 1.)

Illustration.

L. Titius accepted from his wife Seia as part of her dowry a slave Stichus, taken at valuation (*aestimatus*), and had possession of him for four years. Did Titius become owner by *usucapio* ? Certainly, if the slave was not stolen (*res furtiva*) ; and if Titius did not know that the slave belonged to another than his wife. The *usucapio* counts from the marriage. Thus Titius, not Seia, became owner. (Frag. Vat. 111.)

It is in the case of things not fungible, and not taken on valuation, that the much-contested question arises—Was the husband owner (*dominus*), or was his interest confined solely to the rents and produce during the marriage? The true answer to this question must be historical. In the beginning probably the husband was owner, in the fullest sense of the word—perhaps even without any obligation to return the property on the dissolution of the marriage. The first step towards despoiling him of the ownership was when the father of the wife giving the *dos* (and that was doubtless the usual arrangement) insisted upon having it back if he should survive his daughter. Step by step various restrictions were imposed on the husband, until at length, although still called owner, he was divested of nearly every attribute of ownership, and reduced to the position of a tenant. The difficulties introduced by these gradual changes into the nomenclature of the law are amusingly shown by the irritated and yet half-uncertain tone adopted by Justinian in the constitution in which he deprived the husband of the last rag of ownership. As ownership (*dominium*) is purely a technical entity, the best test to apply is perhaps the action that the husband could use. The action appropriate to *dominium* was the *vindicatio*; and it was settled law (A.D. 287) that to the husband alone belonged the *vindicatio* (C. 5, 12, 11), and not to the wife. (C. 3, 32, 9.) Justinian, in changing the law, speaks of the ownership of the husband as a legal subtlety that obscured and defaced the true relation, and says that the property in truth (*naturaliter*) continued in the wife during the whole time. At the same time he shows a curious deference to the prejudices of the profession, so to speak, and endows the wife either with the real action (*vindicatio*), or, if that is too strong, with a first and indefeasible mortgage over it, in preference to all creditors. (C. 5, 12, 30.)

Illustrations.

A husband could manumit the slaves forming part of his wife's *dos*, either during his lifetime or by his will. (C. 5, 12, 3.) The only restriction was that, if he were insolvent, he could not give them liberty in fraud of his wife, who was a creditor for their value. (D. 40, 1, 21.) This is a clear instance of the exercise of ownership, because only the *dominus ex jure Quiritium* could give complete freedom to a slave.

If a slave were made heir to a stranger, it was only his owner (*dominus*) that could authorise him to accept the inheritance. This power the husband enjoyed in respect of a slave forming part of the *dos*. (D. 24, 3, 58.) If, however, the husband acted wrongly, and either did not require the slave to enter on a lucrative inheritance, or required him to enter on one that entailed loss, he was responsible for the loss. To

avoid this risk, the husband was advised not to take any action himself, but to leave it entirely to his wife; if she desired the inheritance, the slave was momentarily delivered to her as owner, on the condition that after the slave had accepted the inheritance, the wife should give him back to the husband, again to form part of the *dos*. (D. 23, 3, 58.)

Alienation by the husband.—The power of alienation is another test of ownership. Undoubtedly ownership may exist without that power, as in the case of children and the insane; but there is a distinction between a disability imposed, as in these cases, for the benefit of the owner himself, and one imposed on a nominal owner for the benefit of other persons interested in the property. In the latter case it is to a certain extent disestablishing the so-called owner.

For lands given as dowry cannot by the *lex Julia* be alienated by the husband against the woman's will; and that though they are his own, and given him as dowry [by *mancipatio*, or *in jure cessio*, or *usucapio*. And whether that rule of law relates to Italian lands only, or also to provincial, is doubted.] Now we, correcting the *lex Julia*, have put this on a better footing. For the statute applied to landed property in Italy only, and forbade it to be alienated against the woman's will, or to be mortgaged even with her consent. Both points we have amended. And now it is forbidden either to alienate or to burden (*obligatio*) even provincial lands; and neither can go on even with the woman's assent, lest the weakness of the female sex should be turned to the ruin of their substance. (J. 2, 8, pr.; G. 2, 63.)

The *lex Julia de adulteriis et de fundo dotali* was passed by Augustus. It applied to houses as well as land. (D. 23, 5, 13.) Under the head of dotal land (*fundus dotalis*) was included land inherited by a slave forming part of the *dos*. (D. 23, 5, 3.) The changes of Justinian are given in C. 5, 13, 1, 15.

On the principle that the greater includes the less, the husband could not burden his wife's land with a servitude, nor could he release a servitude belonging to it. (D. 23, 5, 5; D. 23, 5, 6.)

Illustration.

A husband acquires the ownership of land belonging to Titius, which is burdened with a servitude in favour of land forming part of his wife's *dos*. According to the rule of law, when the ownership of the land entitled to the servitude, and of the land burdened with the servitude, united in the same person, the servitude was extinguished. Suppose the wife survived the husband and recovered the dotal land, was she deprived of the servitude? In strict law she was, but her husband or his representative was required to pay damages if he did not re-establish the servitude. (D. 23, 5, 7.)

The effect of an alienation by the husband against the *lex Julia*, and therefore also under Justinian's legislation, was to convey nothing to the transferee if the wife afterwards had any

right to recover the land. The alienation was wholly void. (D. 23, 5, 3, 1.) But the husband, if he ultimately became entitled by survivorship to the dotal land, could not avoid his own act by pleading the prohibition of the *lex Julia*. As against him the alienation was valid. (D. 23, 5, 17; D. 41, 3, 42.)

II. To the income or produce of the property (*fructus*).

In the case of things reckoned by number, weight, or measure (*res fungibiles*), or of things taken upon valuation (*res aestimatae*), the husband's right of ownership is absolute, and applies equally to the thing itself and its produce. But in respect of the property that he must return, or that he may have to return at the end of the marriage, a different rule prevails, and the husband is entitled only to the income or annual produce (*fructus*). The object was to enable him to defray the expense of the marriage.¹

In the case of slaves, the husband was entitled to their services, or to their wages if he let them out; but not to the children of female slaves. So strongly was it held that the offspring of slaves could not be treated simply as *fructus*, that even a special agreement between husband and wife to that effect was void. (D. 23, 3, 69, 9.) On the other hand, the young of animals was held to be *fructus*, and to them the husband was entitled after keeping up the number of the stock. (D. 23, 3, 10, 3.) The distinction thus drawn between slaves and animals is interesting as a mark of the regard paid by the Romans to the dignity of human nature, but does not seem otherwise to rest upon any solid ground.

In the case of land, the husband was entitled to the annual crops or rents. He could cut for firewood and lop pollards (*silva caedua*), but he was not entitled to the larger trees, even when they were thrown down by the wind. The wife was owner of the trees. (D. 24, 3, 7, 12.) He could open quarries or mines, or work those already opened, but he could not charge any of the expenditure against the estate. (D. 23, 5, 18; D. 24, 3, 8; D. 24, 3, 7, 14.)

III. Compensation for unexhausted improvements.

When a husband was entitled, not to the *corpus* of the property, but only to its produce, the question arose, what

¹ *Quum enim ipse onera matrimonii subeat, aequum est eum etiam fructus percipere.*
(D. 23, 3, 7, pr.)

expenditure was he entitled to charge to the estate, and what ought to be defrayed, out of the accruing income? In other words, what expenditure must he pay himself, and what could he charge as a debt against his wife, or other person entitled to the property after the marriage? The answer turned upon the nature of the expenditure, and for this purpose the object of the expenditure must be considered. The Roman lawyers contemplated a threefold object:—

1. Necessary expenditure (*impensae necessariae*); that is, outlay required to prevent the deterioration or loss of the property (*impensae, quibus non factis dos deterior futura sit*). (Ulp. Frag. 6, 15; D. 50, 16, 79.) Another definition given by Paul throws an instructive light upon it. It is, says that jurist, such outlay as, if not made by the husband, would render him liable in damages to the wife to the extent of the loss caused by his neglect. (D. 25, 1, 4.)

Illustrations.

Repairing a house. (Ulp. Frag. 6, 15; D. 25, 1, 14.) Planting new trees in place of those decayed. (D. 25, 1, 14.) Building a granary, or even, in some cases, a mill. (D. 25, 1, 1, 3.) Medical attendance on slaves. (D. 25, 1, 2.) Rearing vines, or making nurseries for the use of the land. (D. 25, 1, 3.)

Necessary expenditure, although made without the knowledge or consent of the wife, could be charged against the estate: but not all necessary expenditure,—not what was spent to get in the crop or other produce, but only what was spent for the permanent improvement of the property. (D. 25, 1, 16.)¹ The caution is given that no general and exhaustive definition of necessary outlay can be given, but that each case must be considered with reference to the kind and amount of the outlay (D. 25, 1, 15); because if the expenditure is trifling it ought to be charged to current income, and not to the *corpus* of the estate. Thus in the examples above cited of repairs to houses, medicine for slaves, planting vines, &c., if the amount in question is small, it must be charged to the year's produce. (D. 25, 1, 12.) Thus no claim could be made against the dotal estate for expenditure in teaching a slave any art, because the husband had the benefit of the exercise of the

¹ Nos generaliter definimus multum interesse, ad perpetuam utilitatem agri, vel ad eam quae non ad praesentis temporis pertineat, an vero ad praesentis anni fructum. Si in praesentis, cum fructibus hoc compensandum; si vero non fuit ad praesens tantum apta erogatio, necessariis impensis computandum. (D. 25, 1, 3, 1.)

art; but, on the other hand, for the expense of putting out young slaves to nurse, the husband was entitled to compensation. (D. 24, 1, 28, 1.) An agreement that the wife should not be liable to make good necessary expenditure was void. (D. 23, 4, 5, 2.)

2. Beneficial (but not necessary) expenditure (*utiles impensae*) is that without which the property will be no worse, but with which it will yield greater produce; in other words, beneficial expenditure is whatever enhances the selling value (*promercialis*). (D. 25, 1, 10.)

Illustrations.

Making a vineyard or oliveyard. (Ulp. Frag. 6, 16.) Putting cattle on land to manure it. (D. 25, 1, 14, 1.) Making a nursery garden. (D. 25, 1, 6.) Building a mill or granary, if the expenditure was not necessary. (D. 50, 16, 79, 1.)

In regard to unnecessary and merely beneficial expenditure, the rule was that the wife must not be improved out of her estate, and that no charge could be made against her for such expenditure, unless she had known and approved it. (D. 50, 16, 79, 1.) For, says Paul, it would be very hard that a woman should be compelled to sell her property to pay for the improvements that had been made upon it. (D. 25, 1, 8.) Justinian allowed the estate to be charged with all beneficial expenditure, unless the wife had actually or by implication forbidden it. (C. 5, 13, 1, 5.)

3. Ornamental (but not necessary or beneficial) expenditure (*impensae voluptariae*) is outlay not required to keep the property intact, not adding to its selling value (D. 25, 1, 10), but only to its beauty or agreeableness; as, for example, pleasure-gardens and pictures (Ulp. Frag. 6, 17), baths (D. 25, 1, 14, 2), artificial fountains, ornamenting the walls with marble, &c. (D. 50, 16, 79, 2.) For such outlay the husband can charge nothing against the estate, but he is at liberty to carry off everything that can be separated without damaging the property. (D. 25, 1, 9.)

B. Duties of Husband.

I. The husband is bound to take as good care of the dotal property as he does of his own, but he is not responsible for accidental loss. Property that is his own absolutely (*res fungibiles* and *res aestimatae*) is entirely at his own risk, his obligation to return its value remaining intact, whether the property exists or not. (D. 23, 3, 17; D. 24, 3, 11; D. 23, 3,

42 ; D. 23, 3, 10, 1 ; Frag. Vat. 101.) An agreement that the husband should not be responsible for negligence (*culpa*), but only for wilful wrong (*dolus*), was illegal ; but it was competent to the parties to agree that the risk (*periculum*) should or should not be borne by the husband. (D. 23, 4, 6.) But although the husband was not required to take more care of his wife's than of his own property, in one case, the heart, if not the logic, of the jurisconsult dictated an exception. A husband might be cruel to his own slaves, and no one be entitled to interfere ; but if he indulged his savage temper to the injury of the dotal slaves, he was responsible for the damage ; and the jurisconsult assigns as a reason, that conduct towards one's own slaves that can be censured only by opinion, if done to another's slaves is to be punished by law. (D. 24, 3, 24, 5.)

Illustration.

According to agreement, a *dos* included slaves taken on valuation (*æstimata mancipia*), but giving the wife an option, in the event of a divorce, to take the slaves or their value. Some of the slaves had offspring, and on a divorce the wife chose to have back her slaves. Was she entitled to the offspring produced during the marriage ? No, says Paul, because the slaves lived at the risk of the husband, since he took them on valuation (*æstimata*). If he was to suffer the loss, he ought to have the profit accruing to him as owner. (Frag. Vat. 114.)

II. To defray the expenses of the marriage.

The object for which the *dos* was given to the husband is very clearly established—that he was substantially a trustee for the benefit of his wife. There does not appear, however, to have been any clear and distinct legal process to compel the husband, after getting the *dos*, to apply it to its proper purpose. He seems, indeed, in ordinary cases, to have been left to his discretion as to the mode of spending the money. The reason was probably that, owing to the almost unrestricted freedom of divorce, a wife if ill-used had the remedy in her own hands. This may be gathered from the procedure adopted when the wife was insane and incapable of defending herself. If her husband refused to divorce his wife in order to keep her *dos*, and left her without support, the curator of the wife might apply to the courts for a maintenance to the extent of the *dos*, but not more. If the husband were not trustworthy, the court could order the *dos* to be taken from him. (D. 24, 3, 22, 8.)

INVESTITIVE FACTS.

I. By promise (*dictio dotis, stipulatio*). . The consideration of this topic is postponed till the subject of contract is discussed.

II. By giving the property to the husband (*datio dotis*). The husband could be invested with the *dos* in any of the ways in which any person could become owner.

III. Tacit re-settlement. In certain cases, after a divorce, if the parties remarried, the *dos* was held to be restored, unless it was shown that the parties did not intend the *dos* to be reconstituted. (D. 23, 3, 64; D. 23, 3, 40; D. 23, 3, 30.)

Illustration.

A wife, after a divorce, received part of her *dos*, part remaining with the husband. She married another person, who, however, died. She then returned to her first husband, and no mention was made of the part of her *dos* remaining in his hands. Once more a divorce occurred between them, and the husband, says Labeo, would have to return that portion of the *dos* on the same day as he would if the first divorce had not taken place; for upon the return of the wife, the *dos* was regarded as continuously existing up to the second divorce. (D. 24, 3, 66, 5.)

The *dos* might be made either *before* or *after* marriage; and if made before marriage, could be increased at any time during the marriage. (Frag. Vat. 110; C. 5, 3, 19.) If the property is transferred before marriage, the transfer is conditional upon the happening of the marriage. (Paul, Sent. 2, 22, 1.) Hence, whatever produce accrues from the property before the marriage takes place, follows the *dos*, and does not belong to the husband, unless it was agreed that he should have it as an ante-nuptial gift. (D. 23, 3, 7, 1.)

DIVESTITIVE FACTS.

I. During the continuance of the marriage. When the husband became insolvent, or so poor that he could not pay back the *dos* at the end of the marriage, the wife had a right at once to recover what she could. (D. 24, 3, 24, pr.) Justinian allowed the wife to sue for the property as owner if her husband became needy; but she was bound to apply the income to keep the husband, herself, and children. (C. 5, 12, 29.)

II. Termination of the marriage by the captivity of husband or wife. The *dos* cannot be recovered merely because one of the parties is captive; but if the person continues in captivity till death, then the marriage was held to have been dissolved at the time of the captivity, according to the rule of the *lex Cornelia*. (D. 24, 3, 10; C. 5, 18, 5.)

III. The marriage terminated by the death of the wife, leaving the husband surviving. In this case a distinction existed according to the origin of the *dos*. If the *dos* was given by the wife's father, or male paternal ancestor (*dos profectitia*), such person, if alive, could demand it back. If such person were dead, his heirs obtained nothing, and the husband remained absolute owner of the *dos*. (D. 23, 3, 6; C. 5, 18, 4.) Even, however, if the father were alive, he could not always claim the *dos*, for the husband could retain one-fifth of the *dos* for each child of the marriage: so if there were five children nothing could be returned. (Frag. Vat. 120.)

Illustration.

A grandfather (paternal) gives a *dos* to the daughter of his *filiusfamilias*. The grandfather and daughter die, leaving the *filiusfamilias* surviving. Can he recover the *dos*? Yes, even if he were disinherited by his father, because it is made on his behalf for his daughter. (D. 37, 6, 6.)

Such was the law prior to Justinian; but he enacted that if the father or male paternal ancestor were dead, the *dos* should go, not to the husband, but to the wife's heirs (C. 5, 13, 1, 6), and that no deduction should be made by the husband on account of his having children by the marriage. (C. 5, 13, 1, 5.)

When the *dos* was given by the wife, or by any one other than a male paternal ancestor (*dos adventitia*), the husband retained it himself, unless there was a special agreement that it should go back to the person that gave it, or to such person's heirs (*dos receptitia*). (Ulp. Frag. 6, 5.) Justinian changed the rule, and gave the *dos* to the heirs of the wife, unless the person giving the *dos* had specially agreed that it should go back to him or his heirs. (C. 5, 13, 1, 13.) After the changes introduced by Justinian, the husband surviving was thus in every instance deprived of the *dos*.

IV. Termination of the marriage by divorce, one of the parties being in fault. In this case the rules will be found under the head of DIVORCE.

V. Termination of the marriage by divorce, neither of the parties being in fault, or by the death of the husband, leaving the wife surviving. These two cases are governed by the same rules. If the wife was *sui juris*, she alone could demand back the *dos*, whether it was *profectitia* or *adventitia*. Of course, if it was *receptitia*, it would go back to the donor. (Ulp. Frag. 6, 6; C. 5, 18, 11; D. 24, 3, 30; D. 24, 3, 42.) An agreement that if there were children the *dos* should remain with the husband,

was not valid against the wife surviving (D. 23, 4, 2); but it was valid if the wife died first, or the divorce occurred through her fault. (D. 33, 4, 1, 1.) An agreement to reserve even a portion of the *dos* to the children was not valid if the wife survived. (C. 5, 14, 3.) The explanation of this seemingly harsh prohibition must be sought in the strong feeling that prevailed in Rome, that the expense of the children should fall upon the father, and that the wife's property (*dos*) was not to be charged with the burden of providing for them. The wife's heir had no claim unless the husband failed to restore the *dos* within the time allowed by law. (Ulp. Frag. 6, 7; Frag. Vat. 97.) After Justinian, however, the heir of the wife certainly had an action even if no delay occurred, because in the case of *dos adventitia* there was an implied stipulation that the wife should get the *dos*, and the benefit of this stipulation descended to her heirs. (C. 5, 13, 1, 13.) Probably a similar construction would have been adopted in the case of *dos profectitia*.

If the wife is not *sui juris*, but under the *potestas* of her father, then both together had a right to the *dos*, whether it were *profectitia* or *adventitia*. (Ulp. Frag. 6, 6; D. 24, 3, 2, 1.) No receipt was effectual to discharge the husband or his heirs, unless it were signed by both father and daughter. (D. 24, 3, 3.) The consent of the daughter was assumed, unless she distinctly refused. (D. 24, 3, 2, 2.)

Illustration.

A father, in virtue of his *potestas*, sent to his son-in-law, against the wish of his daughter, a bill of divorce. Could the father also demand back the *dos* he gave with his daughter? Paul answered that the effect of the bill of divorce was undoubtedly to dissolve the marriage, but that the father could not forcibly take away his daughter from the son-in-law, and could not recover the *dos* from him without her consent. (Frag. Vat. 116.)

TIME of restoring the *Dos*. According to Ulpian (Ulp. Frag. 6, 8), fungible things must (in the absence of special agreement) be returned in three portions in three successive years from the dissolution of the marriage. Things not fungible were to be restored at once. Justinian altered the rule, and enacted that moveables, animals, and incorporeal things should be restored within one year; land or houses immediately. (C. 5, 13, 1, 7.)

An agreement that the restitution of the *dos* should be delayed beyond the legal time was void, but not an agreement to hasten the time. (D. 23, 4, 15; D. 23, 4, 16.)

REMEDIES.

A. In respect of Rights and Duties.

1. A husband could, in restoring the *dos*, retain the amount he had expended on permanent improvements. (Ulp. Frag. 6, 9; C. 5, 13, 1, 5.)

For to meet his expenses on the property forming the dowry, the husband is allowed to keep back part. For by the very nature of the right, from the dowry must be subtracted all necessary expenses, as may be learned from the fuller statements in the Digest. (J. 4, 6, 37.)

2. Justinian gave two actions; (1) *actio mandati* (the usual action to enforce agency), when the wife consented to the outlay; and (2) *actio negotiorum gestorum*, when she did not. (C. 5, 13, 1, 5.) These actions will be explained under the law of contract.

B. In respect of Investitive Facts. The husband had the usual remedies of an owner (*dominus*). (C. 5, 12, 11.)

C. In respect of Divestitive Facts. The wife or other person entitled to the *dos* on the dissolution of the marriage could not take possession of the property without the authority of a judge. (C. 5, 18, 9.)

1. *Actio rei uxoriae* was the remedy by which a wife or her father could recover the *dos* from the husband or his heirs. (D. 24, 3, 31; D. 24, 3, 44.) It was an action *bonae fidei*, that is to say, one in which the *judex* could take into account equitable considerations, although they were not pleaded *in jure*. (See Book IV., Proceedings *in Jure*.) It had, besides, the peculiarity that the husband was not compelled to pay so much as to reduce him to destitution; and the same privilege was extended to his sons if heirs, but not to any other persons when his heirs. (D. 24, 3, 12; D. 24, 3, 15, 2; D. 24, 3, 18.)

And again, if a woman brings an action at law for her dowry, it is held that the husband ought to be condemned to pay only what he can—as much, that is, as his means allow. Therefore if his means are equal in amount to the dowry, he is condemned to pay the entire sum; but if not, then as much as he can. And the claim for repayment is lessened by his right to keep back part of the dowry. (J. 4, 6, 37.)

This was a privilege that the husband could not deprive himself of, even by his own agreement. (D. 24, 3, 14, 1.)

2. *Actio ex stipulatu*, or *actio in factum praescriptis verbis*. (For *dos recepticia*.)

Such was the remedy of any one that had bargained that the *dos* given by him to a wife should return to him. It was simply the ordinary action for contract.

These actions are personal (*actiones personales*); that is, they are to enforce rights *in personam* merely, not rights *in rem*. It follows, therefore, that so long as these were the only remedies, the wife's interest in the *dos* after marriage was not of the nature of ownership (*dominium*), but rather of mere obligation. This was, however, affected by the prohibition of the *lex Julia*, which made the husband's alienation void against the wife, and so enabled her, through the medium of a personal action, to recover her property.

3. Changes by Justinian. Justinian abolished the *actio rei uxoriae*, and decided that the *actio ex stipulatu* should take its place, but so that every benefit of the former should be attached to the latter. (C. 5, 13, 1, §§ 1, 2, 9-13.)

Formerly the action to recover a wife's property (*actio rei uxoriae*) was one of the proceedings in good faith (*ex bonae fidei iudiciis*). But finding

the *actio ex stipulatu* gave more scope, we have transferred all the rights attaching to the wife's property to the *actio ex stipulatu*; but with many distinctions when it is put forth to recover dowries. And rightly as the action to recover a wife's property is thus done away with, the *actio ex stipulatu*, brought in to take its place, has justly taken the nature of a proceeding in good faith, and is therefore so regarded—but only when employed to obtain a dowry. (J. 4, 6, 29.)

He also gave the real actions (*vindicatio* or *actio hypothecaria*) to recover the property, whether in the hands of the husband or another. (C. 5, 12, 30; C. 5, 13, 1, 1.)

(A.) *DONATIO PROPTER NUPTIAS.*

This was an arrangement corresponding to the *dos*, but of immensely less antiquity. The first undoubted notice of it (for we may assume that C. 5, 3, 7 refers to a match being broken off, and not to the dissolution of the marriage) is in A.D. 449, in a constitution of Theodosius and Valentinian, where forfeiture of the donation is taken along with forfeiture of the *dos* as a punishment for causeless divorce. Justinian says it is, in name and reality, the same as the *dos* (C. 5, 3, 20, pr.), being a correlative contribution by the husband to the wife. Justinian gave the wife a real action (*vindicatio*) against all possessors to recover the property included in the *donatio propter nuptias* (Nov. 61, 1), and it is not perhaps an unreasonable inference that the wife had the same general powers in respect of such donation as the husband had in respect of the *dos*. The following passage is given in the Institutes:—

There is also another kind of *donatio inter vivos*, entirely unknown to the old jurists, but brought in after their time by the later of our imperial predecessors. This was called the *donatio ante nuptias* (prenuptial gift), and implied as a tacit condition that it should not be binding till followed up by the marriage. Indeed it was called *ante nuptias* because it was accomplished before the marriage, and after the celebration of the nuptials no such gift was bestowed. But the late Emperor, *Justinus* our father, seeing that increase of dowries after marriage was allowed, was the first to permit by his constitution that in any such event the *donatio ante nuptias* might be increased also, even though the marriage had already taken place. But the name remained, though now unsuitable; for it was called prenuptial, while it thus received a postnuptial increase. But we being anxious to sanction a full and final settlement, and carefully suiting names to things, determine that such gifts may not only be increased, but may begin even when the marriage has already taken place. And further, we determine that the gifts shall be called not *ante nuptias* but *propter nuptias*, and shall be put on the same footing as dowries in this respect, that as dowries are not only increased but come into being when the marriage has already taken place, so too

those gifts brought in *propter nuptias* may not only precede marriage, but may even after it is contracted be both increased and settled (for the first time). (J. 2, 7, 3.)

The children of the marriage had no interest in the donation any more than in the *dos*. (C. 5, 3, 18.) Justinian also enacted (C. 5, 3, 20, 1) that the same kind of agreements as were valid in the case of the *dos* should be allowed in the donation. He observes that as such gifts, under the general law, required to be registered in court (*insinuatio*), and as husbands, often purposely neglected to do so, with the object of depriving their wives of a legal remedy, henceforth such proclamation might be made at any time during the marriage. (C. 5, 3, 20, 1.)

In another respect the analogy was at least partially kept up. Heretic fathers (as also Jews and Samaritans) having orthodox children were obliged to give them both *dotes* and *donationes* to the satisfaction of the Provincial Presidents and Bishops. (C. 1, 5, 13 ; C. 1, 5, 19.)

(B.) THINGS OVER WHICH OWNERSHIP CANNOT BE EXERCISED.

By ownership (*dominium*) is understood private property, where a person exercises all the rights of enjoyment and alienation summed up in the word ownership. There were many objects, however, over which the full right of ownership could not be exercised. These objects will now be enumerated, with a statement of such rights as could be exercised in respect of them.

I. Things common to all men (*Res communes*).

Private property implies not merely the right of the owner to use the thing of which he is owner, but also the right to prevent any one else using it, even where such use would not in the slightest degree interfere with his enjoyment of it. But certain objects cannot be so appropriated. The atmosphere, for instance, must be used incessantly by all on pain of death, and no human being can be excluded from the use of it. Private property in the air is physically impossible. Next to the air, the high sea is most difficult of appropriation, and practically no combination of men is ever likely to have such a naval force as would enable them to prevent others using the ocean. A restricted ownership is indeed allowed by modern international law. Every nation has an exclusive right to control the navigation and fisheries on its coasts for a limited distance.

And, indeed, by the *jus naturale* these things are common to all men—the air, and running water, and the sea ; and therefore the sea-shores. Hence no one is forbidden to approach the sea-shore, provided only he respects villas, and monuments, and buildings ; because they are not under the *Jus Gentium* as is the sea. (J. 2, 1, 1.)

The sea-shore extends to the highest point reached by the waves in winter storms. (J. 2, 1, 3.)

The use by the public of the shores is part of the *Jus Gentium*, just as is the use of the sea itself. And therefore it is free to any one to place a hut there to which to betake himself, or to dry nets there, or to haul them up from the sea. But of those shores it is understood that no man is owner; for they come under the same rules of law as the sea itself and the underlying earth or sand. (J. 2, 1, 5.)

RIGHTS in *res Communes*. 1. The right of fishing in the sea belongs to all men. This was specially stated by Antoninus Pius in a rescript to the fishermen of Formiae and Capena. (D. 1, 8, 4, pr.) 2. Every one had a right to build on the shore, or, by piles, upon the sea, and retained the ownership of the construction so long as it lasted; but when it fell into ruins, the soil reverted to its former state as a *res communis*, which any other person might build upon. (D. 1, 8, 6; D. 1, 8, 10.) But any one could forbid the erection of a pier or other construction that would interfere with his use of the sea or beach. (D. 43, 8, 3, 1; D. 43, 8, 4.)

REMEDIES.—1. *Actio injuriarum*.—Whosoever prevents a man fishing in the sea was considered to commit an *injuria*. (D. 47, 10, 13, 7; D. 43, 8, 2, 9.) 2. *Interdictum utile*.—Any person whose use of the sea or beach would be impaired by any construction or building could move for an interdict, after the analogy of the interdict (*ne quid in loco publico fiat*), to prevent such nuisance in public places. (D. 43, 8, 2, 8.)

II. Things belonging to the State (*Res Publicae*).

Those things are alone said to be public that belong to the Roman people (D. 50, 16, 15); to this must be added things that may be used by the public.

All rivers again, and harbours, are public, and therefore the right of fishing therein is common to all. (J. 2, 1, 2.)

The use of the banks, too, is public by the *Jus Gentium*, like that of the river itself. And so any one is free to bring to his ship there, to make it fast by cables to the trees that grow there, and to unload any burden upon the banks, just as he is to sail along the river itself. But the adjoining land-owners are proprietors of those banks, and therefore the trees that grow thereon belong to them. (J. 2, 1 4.)

The distinction between public things and common things was not in the nature of the rights exercised over them, for in both the use of the things belonged to men generally; but the difference was that common things were regarded as having no owner (*res nullius*); whereas public things were regarded as belonging to the State, or, as in the case of river banks, to private individuals. The shores of the sea were not considered subject to the ownership of the State (D. 41, 1, 14,

pr.), but simply as under its supervision or jurisdiction. (D. 43, 8, 3.)

The State might be owner in two very different ways. In one way, it might exercise all those rights of exclusive use that an ordinary private proprietor did; as, for example, in the Republican Exchequer (*Ærarium*); the Imperial Exchequer (*Fiscus*), the slaves belonging to the State (*servi populi Romani*), mines (*metalla*), and lands (*agri vectigales*). Such things may truly be said to be in the ownership of the Roman people (*in patrimonio Romani populi*). (D. 43, 8, 2, 4.) The things subject to such rights were not called public.

In another sense, the State may be regarded as a sort of owner, as in respect of harbours where the ownership of the soil was regarded as inhering in the State, but the perpetual use thereof was dedicated to the public. This left an extremely shadowy sort of ownership in the State; but in regard to rivers and their banks, the right of the private proprietor was only suspended so long as the water kept its channel; if it deserted its bed, he again recovered his right of exclusive enjoyment.

The two chief classes of public things were public roads and rivers and harbours.

1. PUBLIC ROADS (*Publicae viae*). Roads are of several kinds; (1) public, either Praetorian, or consular, or military; (2) private, connecting fields; and (3) local (*vicinales*), which either are in villages or lead to them. (D. 43, 8, 2, 22.) The local roads are established by private persons upon their own land; but if the memory of such private individual has perished, they are treated as public. (D. 43, 7, 3, pr.) A military road must terminate in the sea, or in a town, or in a public river, or in another military road; the local roads may not even join to a military road. (D. 43, 7, 3, 1.)

Private roads are of two kinds; (1) strictly private, confined in their use to the owners of certain lands; and (2) private roads with permissive use to the public, and connecting a house with a public highway. (D. 43, 8, 2, 23.)

Public roads in the city of Rome were under the care of the Curule Ædiles, who had full powers to keep them in order, and prevent all injury to them, or interference with their legitimate use. To them we do not in the subsequent remarks refer, but only to the roads in the country. (D. 43, 10, 1, 1; D. 43, 8, 2, 24.)

RIGHTS IN RURAL PUBLIC ROADS.—(1.) Every person was entitled to the use of a public road as a highway.

(2.) It was forbidden to obstruct a highway, or other place of which the use was in the public, as by setting up a monument (D. 43, 7, 2) or any construction. (D. 42, 8, 2, pr.) Even if a thing has been built without objection, it cannot be repaired if it is an obstruction. (D. 43, 8, 2, 7.)

Any one could compel the removal of the obstruction, and get compensation if he was injured, as by taking away his outlook or light (D. 43, 8, 2, 14), or interfering with the approach to his house. (D. 43, 8, 2, 12.)

(3.) No one was allowed to do anything to a road, or place anything upon it, rendering it less useful as a highway.¹

Illustrations.

A road is made worse, when, from being plain, it is made hilly; when, from being smooth, it is made rough; or when it is made narrower or swampy. (D. 43, 8, 2, 32.)

After some hesitation, it was held that a road was deteriorated when a bridge was built over it, or a tunnel driven below it. (D. 43, 8, 2, 33.)

A road is made worse when a sewer is opened into it (D. 43, 8, 2, 26); or if water is allowed to overflow from an artificial pond (D. 43, 8, 2, 27); or when it is built upon in such a way as to prevent the rainfall running off the road. (D. 43, 8, 2, 28.)

A road is also regarded as made worse if noisome smells are made in the vicinity of it. (D. 43, 8, 2, 29.)

INVESTITIVE FACTS.—A public road is either one constructed by public authority, or a private road that has been so long used by the public that the time when it was first made has been forgotten. (D. 43, 7, 3.)

DIVESTITIVE FACTS.—No prescription avails against the rights of the public to the use of a public road or path. It remains public although it is never used by the public. (D. 43, 11, 2.)

REMEDIES.

(1.) The right of using a public road was secured by interdict.² "The Praetor says, I forbid any violence to be done to hinder a man from going or driving freely along a public road or way." This interdict applied only to public roads; curiously enough, rights to other public things or common things were not protected by any interdict, except the right of navigation in rivers. Thus a right to fish or sail in the sea, to play in the public parks, to bathe in a public bath, or to sit in a public theatre, was protected by the *actio injuriarum*. (D. 43, 8, 2, 9.)

¹ *Aut Praetor: In via publica itinereve publico facere, immittere quid, quod ea via idve iter deterius sit, fiat veto.* (D. 43, 8, 2, 20.)

² *Praetor ait: Quominus illi via publica itinereve publico, ire agere liceat, vim fieri veto.* (D. 43, 8, 2, 45.)

(2.) To prevent buildings and constructions prejudicial to private individuals, an interdict could be brought by the person directly injured. (D. 43, 8, 6.) The interdict was prohibitory; its object was to prevent, not to punish; hence, if any one builds without objection, he cannot be compelled to pull down; but the procurator of public works may impose a ground-rent (*solarium*). (D. 43, 8, 2, 17.) If the building or construction is not finished, security is required that it shall not be proceeded with. (D. 43, 8, 2, 18.)

(3.) Damage to the road itself was dealt with by a special interdict, which might be brought by any one (whether complaining of any special injury or not), and after any length of time: the amount of damages was fixed with reference to the interest of the complainant in the condition of the road. (D. 43, 8, 2, 34.) It is not merely preventive, but remedial (*restitutoria*), and the wrong-doer is obliged to restore the road to its previous state, as by giving back what he has taken away, or by taking away what he has left on it. (D. 43, 8, 2, 43.)

2. RIVERS, AND BANKS OF RIVERS. A river (*flumen*) is distinguished from a stream (*rivus*) by its greater magnitude, or by reputation. (D. 43, 12, 1, 1.) Rivers are either permanent (*perennia*), flowing all the year round, or winter torrents (*torrentia*) that leave their beds dry in summer. A permanent river might, however, occasionally dry up without forfeiting its character. (D. 43, 12, 1, 2.) A public river is a permanent river. (D. 43, 12, 1, 3.) Public rivers are of two kinds, navigable and not navigable. A bank of a river (*ripa*) is defined, after the analogy of the sea-shore, as the furthest reach of the river. (D. 43, 12, 3, 1.) This, however, is true only so long as the river keeps within its natural course. Occasional floodings do not change the legal extent of the bank, otherwise all Egypt would be a bank of the Nile. But if the increase or abatement is permanent, the bank is regarded as altered. (D. 43, 12, 1, 5.)

RIGHTS IN PUBLIC RIVERS.¹ (1.) "The Praetor says I forbid any violence to be done to hinder any man from freely sailing a ship or boat on a public river, or from loading or unloading at the bank. And also I will grant an interdict to secure the right to sail freely over a lake, a canal, or a pond that is public."

Lake (*lacus*) is a natural and permanent collection of water. (D. 43, 14, 1, 3.)

Pool (*stagnum*) is a natural collection of rain-water, and not permanent, but often dried up. (D. 43, 14, 1, 4.)

Fossa is a trench or canal made by men (D. 43, 14, 1, 5), which was sometimes public.

(2.) It was forbidden to do anything to a river or its banks,

¹ Praetor ait: Quominus illi in flumine publico navem, ratem agere, quove minus per ripam onerare, exonerare liceat, vim fieri veto. Item ut per lacum, fossam, stagnum publicum navigare liceat interdicam. (D. 43, 14, 1, pr.)

or place anything thereon, that would impede the navigation or use of the banks. (D. 43, 12, 1, pr.)

Illustrations.

The owner of both sides of a stream cannot throw a private bridge across the stream. (D. 43, 12, 4.)

Water may be led from a river, unless specially forbidden by the Emperor or Senate, or unless it makes the river less navigable. (D. 39, 3, 19, 2; D. 43, 12, 2.)

Water withdrawn from a public river for irrigation ought to be divided according to the dimensions of the fields; but water was never allowed to be withdrawn if it were to cause injury. (D. 8, 3, 17; D. 43, 20, 3, 1.)

Repairs of a river bank were permitted only if no damage was done to the navigation. (D. 43, 15, 1, 2.)

Anything that would cause a public river to change its channel from that in which it ran during the preceding summer, or to make its course more rapid, was unlawful. (D. 43, 13, 1; D. 43, 12, 1, 3.)

These rights were enforced by interdicts. (D. 43, 14, 1, 1; D. 43, 12, 1, pr.; D. 43, 13, 1, 11.)

III. Things belonging to corporate bodies (*res universitatis*).

There are things that belong to a corporation, not to individuals; city theatres, for instance, race-courses, and the like, owned in common by the cities. (J. 2, 1, 6.)

The expression *universitas* is used in two different significations; the correlative word *singuli* is used with corresponding diversity of meaning. *Res singulorum* mean things belonging to individual men: their opposite is *res universitatis*, or corporate property. *Res singulae* mean any things or aggregate of things as opposed to a *universitas juris*, or totality of rights and duties inhering in any individual man, and passing to another as a whole at once. The most interesting and important example of a *universitas juris* is inheritance: the analysis of the notion will be reserved. Meanwhile it is sufficient to note the ambiguity in the word *universitas*.

A *universitas* or corporate body exists when a number of persons are so united that the law takes no notice of their separate existence, but recognises them only under a common name, which is not the name of any one of them. (D. 3, 4, 2; D. 3, 4, 7, 1.) All the members are considered in law as a single unit or being. (D. 46, 1, 22.) Such units are sometimes called "fictitious persons," because the corporate body, as such, may sue and be sued, receive or part with property, bind itself or bind others, through some agent or syndic (D. 3, 4, 1, 1) who acts in the name of the whole, just as any individual may act for himself. (D. 3, 4, 7, 1.) The chief characteristic of such a body is that it does not necessarily die. (D. 5, 1, 76.)

A corporation could not, by the Roman Law, be created by private agreement; it required the authority of a statute (*lex*), *Senatus Consultum* or constitution of an Emperor. (D. 3, 4, 1.)

The lowest number that could form a corporation (*collegium*) or company (*societas*) was three (D. 50, 16, 85); but it seems that if the number of an existing corporate body was reduced to two or even to one in a town it could still be maintained. (D. 3, 4, 7, 2.) There were many such corporations in Rome, chiefly connected with trades, such as the guild of bakers, and shipowners, companies of tax-gatherers, companies for working mines of gold, silver, salt, &c. The internal government of the corporate bodies was in the hands of the members (*sodales*). (D. 3, 4, 4.)

Corporate bodies, like States, might enjoy two kinds of ownership. They might be owners, just like private individuals; and herein such bodies form no exception to the general observations made with reference to private property. But some of such bodies—municipalities, for example—might hold property of which people in general were entitled to the use. It is to this alone that Justinian refers. In this sense alone are *res universitatis* analogous to *res publicae*; the former belong to cities or municipalities, the latter to Rome itself. We have thus three classes of things of which the use was general: common things, having no owner; public things, the ownership being in the Roman people; and *res universitatis*, of which the use was in the public, and the ownership in the municipality.

IV. The last class of things withdrawn from the exercise of ownership (*dominium*) is connected with religion, and consists of three groups (*res divini juris*).

The ultimate division of things, then, is into two classes; for some are under Heaven's law, some under man's law. (G. 2, 2.)

Of things under Heaven's law, things sacred and devoted are instances. (G. 2, 3.)

1. Sacred things are things consecrated to the gods above (*res sacrae*); devoted, those left to the gods the shades (*res religiosae*). (G. 2, 4.)

But a sacred thing, it is held, can be made so only by the authority of the Roman people; for it is consecrated by a statute passed, or by a *Senatus Consultum* made for that purpose. (G. 2, 5.)

Sacred things are things that have been duly (that is by the priests) consecrated to God—sacred buildings, for instance, and gifts duly dedicated to the service of God. And these we, by our constitution, have forbidden to be alienated or burdened (*obligari*), except only in order to redeem prisoners. But if any man, by his own authority, establishes a would-be sacred thing for himself, it is not sacred, but profane. A place, however, in which sacred buildings have been erected, even if the building is pulled down, remains still sacred, as Papinian too wrote. (J. 2, 1, 8.)

Those two passages illustrate the change introduced by the adoption of Christianity

as the State religion of the Empire. In the old religion certain deities were supposed to preside over the celestial region, and property consecrated for their worship was *res sacrae*; other deities to preside over the realms of the dead, and, in their regard, the place where a dead body was placed, became *religiosus*. In the time of Justinian the gods of the celestial region were replaced by the God of the Christians; and *res sacrae* continued to mean things devoted to religious worship. There was also a continuity in the investitive facts. No property could be allowed to pass under the exclusive care of the priests, except with the sanction of the State. Under the Empire the Emperor alone could authorise the dedication of property to religious uses. (D. 1, 8, 6, 1.)

The constitution to which Justinian refers allowed the sale of church property in famine also; for he says it is not unreasonable to prefer the lives of men to vessels and vestments. (C 1, 2, 21.) By a later enactment, a church unable to pay its debts was allowed to sell superfluous vessels, but not its immoveables, or anything required for the service of the church. (Nov. 120, 10.)

2. Burial-ground (*res religiosae*).

A place in which the body or ashes of a human being (even a slave) (D. 11, 7, 2) were laid became religious, if the consent of the proper parties had been obtained, and if it were intended to be the final, and not merely a temporary, resting-place. (D. 11, 7, 2, 5; D. 11, 7, 40.) A monument or erection in memory of a deceased person (D. 11, 7, 2, 6) was not a sepulchre unless it contained a dead body. (D. 11, 7, 42; D. 11, 7, 6, 1.)

RIGHTS of the quasi-owner of a burial-place.

(1.) A burial-place was not alienable. (C. 3, 44, 9; C. 9, 19, 1.) On a sale of the land in which it was contained, it did not pass to the buyer. (Paul, Sent. 1, 21, 7.)

(2.) A wrong was done by erasing the inscriptions, throwing down any statue, or overthrowing a stone or column, or otherwise defacing a tomb. (Paul, Sent. 1, 21, 8.)

(3.) It was an offence to bury a person in a sepulchre without having the right to do so. (D. 47, 12, 3, 3; Paul, Sent. 1, 21, 6.)

INVESTITIVE FACTS.—(1.) A devoted place we make so by our own choice, by bringing a dead man into a spot that is ours, if only it is our part to bury him. (G. 2, 6.)

But in provincial soil, according to the general opinion, a place cannot be devoted; because of that soil the Roman people or Caesar is owner, while we have only the possession and usufruct. A place of that sort, however, although not devoted, is looked on as if it were (*pro religioso*). For so, too, in the provinces, what has not been consecrated by the authority of the Roman people, although properly not sacred, is yet looked on as if it were. (G. 2, 7.)

The theory that no ownership (*dominium ex jure Quiritium*) could exist over lands in the provinces, inasmuch as they belonged to the State, was, by the construction explained by Gaius, not permitted to deprive the inhabitants of the pleasure of having their burying-places secure from intrusion. It will be observed that the introduction of Christianity led to no essential alteration of the law of sepulture.

A devoted place is made by each man of his own choice, when he brings a dead man into a spot that is his. But into a pure spot owned in common you cannot bring the dead against the will of a joint owner; into a burying-place owned in common, however, you may, even against the will of all the other owners. And again, if the usufruct is another's, it is held that the proprietor cannot, unless that other consents, make the place devoted. Into another's ground, by the owner's leave, you may carry the dead; and even if he ratifies the deed only after the dead has been carried in, yet the spot becomes devoted. (J. 2, 1, 9.)

A pure spot is one not before used for interment.

It was a law, moreover, that no one could be buried within the city, even in his own land. (Paul, Sent. 1, 21, 2; D. 47, 12, 3, 5.)¹

DIVESTITIVE FACTS.—(1.) Paul tells us that if a river laid bare a sepulchre, or it threatened to fall down, the body might be removed during the night, after the offering of solemn sacrifices, to another place, which would thereupon become devoted. (Paul, Sent. 1, 21, 1; D. 11, 7, 44, 1.) In other cases the removal of a dead body from the place intended to be final was forbidden. (D. 11, 7, 39.)

(2.) If the land were taken in war, it was regarded as losing its character; which, however, was restored if the land was reconquered. (D. 11, 7, 36.) "The tombs of the enemy are not sacred to us," was the churlish maxim of the law. (D. 47, 12, 4.)

REMEDIES. (1.) *Actio de sepulchro violato*. It was a crime to hinder the burial of any body wrongfully, or to violate a sepulchre (D. 47, 12, 8); but the action here named carried only a fine in money. (D. 47, 12, 9.) The action was Praetorian, and was given in the first instance to the owner of the soil; and if the owner did not appear, then to any one that pleased; and if several appeared, then to whichever seemed to have best reason. (D. 47, 12, 3.)

When an action was brought by the owner of the soil, the damages were fixed at whatever sum might be considered by the judge to be proper; and if by a person not owner, the penalty was 100 *aurei*. (D. 47, 12, 3.) Condemnation carried with it infamy. (D. 47, 12, 1.)

(2.) *Actio in factum*.—To prevent a person burying a body where he had no right. The Praetor says, "If it is alleged a dead man, or the bones of a dead man, are carried into pure ground [*i.e.* ground not sacred, or devoted or hallowed, (D. 11, 7, 2, 4)] belonging to another, or into a burying-place to which there is no right, then the doer shall be liable to an *actio in factum*, and shall be subjected to a pecuniary penalty." (D. 11, 7, 2, 2.)

(3.) A special interdict was allowed when any one was prevented burying a corpse in land that belonged to him. (D. 11, 8, 1.)

3. Hallowed things (*res sanctae*), too, such as walls and gates, are in a way under Heaven's law, and therefore form part of no one's goods. And the reason why we call walls hallowed is this, that a capital penalty is fixed for

¹ XII Tables. *Hominem mortuum in urbe ne sepelito neve urito.*

those that do them any wrong. And for the same reason, too, we call those parts of statutes in which we fix the penalties for those that act in defiance of the statutes "sanctions." (J. 2, 1, 10; G. 2, 8.)

Ambassadors also were regarded as hallowed: persons who struck or injured them were delivered up to the nation they represented. (D. 50, 7, 17, pr.)

The walls of cities could not be touched or even repaired without the authority of the State. (D. 1, 8, 6, 4.) To leap the walls was the offence for which Romulus is said to have killed his brother Remus. (D. 1, 8, 11.)

Things sacred and hallowed were protected by an interdict which was both prohibitory and restitutory. (D. 43, 8, 2, 19; D. 43, 6, 2.)

(c.) *RESTRICTIONS ON VOLUNTARY ALIENATION.*

The Roman Law imposed restrictions on the voluntary alienation of property, both in respect of the mode of alienation and also of the amount that might be given. A voluntary alienation is one that a person is not compelled by law to make; as a gift.¹

(a.) Restrictions as to the mode of voluntary alienation.

There are other gifts too made without any thought of death, and called *inter vivos*. These are not to be compared to legacies in any respect, and if once completed they cannot be readily revoked. And they are completed when the giver has openly declared his intention, whether in writing or not. Our constitution, too, has determined that these gifts, like sales, should in themselves involve the necessity of delivery, but so that if no delivery took place they should be fully and completely valid, and the necessity of delivery should rest upon the giver. And since the arrangements of former emperors willed that such gifts should be registered in the public records if of more than 200 *solidi*, our constitution has extended the amount to 500 *solidi*, and decided that gifts up to that sum shall stand even without registration. It has, too, found certain gifts, of which registration is entirely needless, which are in themselves most fully valid. And many other points beside we have found tending to the freer issue of gifts, that can all be gathered from our constitutions laid down regarding this. Yet it must be known that although the gifts are quite unqualified, still if those that receive the boon prove ungrateful, we have by our constitution given leave to revoke the gifts on certain fixed grounds. For we would not have those that have bestowed their property on others to suffer at the hands of these very men outrage or loss after the fashions enumerated in our constitution. (J. 2, 7, 2.)

In this passage Justinian deals with two very distinct though closely related subjects, voluntary promises and voluntary alienations. The effect of a voluntary promise

¹ *'Quod nullo jure cogente conceditur.'* (D. 50, 17, 29.)

was to bind the promiser to deliver what he promised; but until delivery there was no change of ownership in the thing. Moreover, gifts exceeding 500 *solidi* must be registered.

Constantine enacted that voluntary alienations should be evidenced by a written document, containing the name of the donor, and a description of the nature of his rights and of the property; that this document should be registered, and that the property should be delivered in the presence of witnesses. (C. Th. 8, 12, 1; C. Th. 8, 12, 3.) These precautions were superseded by the rules introduced by Justinian.

(β.) Restrictions on the amount of gifts.

I. An old statute (*lex Cincia*, B.C. 203) that continued to exist up to the time of Constantine, but fell into *desuetude* before Justinian, prohibited gifts beyond a certain amount (which is not stated), except as between certain relatives. Gifts to the extent to which they exceeded the limit, but no further, were void. (Frag. Vat. 266; Ulp. Frag. pr. 1.) It seems, however, that if the donor did not revoke the gift during his life or by will, the gift was confirmed. (Frag. Vat. 294.)

The persons exempted from the restrictions of the *lex Cincia* were (1) all persons related by blood (*coynati*) up to the fifth degree, and to second cousins in the sixth degree; also those in whose *potestas*, *manus*, or *mancipium* such persons were, or those over whom such persons had *potestas*, *manus*, or *mancipium*. (Frag. Vat. 298-301.) (2) Persons related by affinity, so long as the tie lasts, but no longer. (Frag. Vat. 302.) (3) Tutors to pupils, but not pupils to tutors. (Frag. Vat. 304.) (4) Patrons and freedmen. (Frag. Vat. 307-309.) (5) Any blood relation beyond the sixth degree could make a gift as a dowry. (Frag. Vat. 305, 306.)

II. It was enacted by Severus and Antoninus that alienations made by persons after the commission of a capital crime, without valuable consideration, should be invalid if condemnation followed. (D. 39, 5, 15; D. 39, 5, 31, 4.)

III. Gifts to concubines or natural children. Constantine seems to have prohibited all gifts or bequests to natural children or concubines. (Nov. 89, pr.; C. Th. 4, 6, 1.) This was part of his policy to discourage and repress concubinage. With this object in view he introduced, on the one hand, the privilege of legitimation by subsequent marriage; and, on the other hand, he imposed on concubines and natural children an incapacity to take any property from the father, either in his lifetime or on his death. In A.D. 371, however, we find this severity mitigated in certain cases by a constitution of Valentinian, Valens, and Gratian. (C. Th. 4, 6, 1.) If a person died leaving legitimate children or grandchildren, or a father or mother, all gifts or bequests made by him to his concubine or natural children exceeding one-twelfth of his property were declared void. If a person died without leaving such relatives, he could give his

concubine or natural children as much as one-fourth, but not more. In substance this provision agrees with a subsequent constitution of Arcadius and Honorius, A.D. 403. (C. 5, 27, 2.) Justinian admitted a further relaxation. If a person has any legitimate children, he cannot give his natural children or his concubine more than one-twelfth of his property. If he leaves no legitimate children, but ascendants, for whom he is obliged to provide in his will, then the natural children can get as much as the father pleases, if enough is left to satisfy the legal claims of the ascendants. If there are no legitimate children, and no such ascendants, a father may leave his whole property to his concubine or natural children. (Nov. 89, 2.)

IV. Gifts between husband and wife. Before marriage, an intending husband or wife could make gifts to the other without restriction, and the gifts might even be conditional upon the celebration of the marriage (Frag. Vat. 262); but after marriage a husband could not make a gift to his wife, nor to her father, if she were under his *potestas*; nor could a wife make a gift to her husband, nor to his father, if he were in his father's *potestas*, nor to his children if they were in his *potestas*. (C. 5, 16, 4; Frag. Vat. 269.) In the age of Antoninus this rule was ascribed to custom (D. 24, 1, 1; D. 24, 1, 3); but it has been pointed out that the prohibition of the *lex Cincia* did not apply to husband and wife, from which it may be perhaps inferred that the rule did not exist during the Republic, about B.C. 200.

When a wife ceased to be in the *manus* of her husband, she enjoyed complete proprietary independence, unless she remained in the *potestas* of her father. Thus the wife, like the husband, kept her property separate. As both, therefore, might by foolish generosity be deprived of their property, the rule prohibiting gifts was made applicable to both; for, as was said by the Emperor Antoninus, the object of marriage was the satisfaction of an honourable love, and not that either husband or wife should gain money by it. (D. 24, 1, 3, pr.)

Exceptions.—1. Birthday and other presents, if moderate in amount, were not prohibited. According to custom, every year husbands made presents to their wives on the Kalends of March, and wives to their husbands on the Saturnalia. (D. 24, 1, 31, 8.)

2. Gifts were valid if they were not to take effect until the dissolution of the marriage. A gift made in contemplation of an immediate divorce was valid; but was prohibited if made

with reference to a future possible divorce. (D. 24, 1, 61; D. 24, 1, 62; D. 24, 1, 12.)

3. Gifts were not prohibited unless they made the giver poorer, and also the receiver richer. (D. 24, 1, 25.)

Illustrations.

A husband refuses a legacy or inheritance, which thereby goes to his wife. Although the husband did this by way of gift, the wife's title is perfect. The renunciation does not take from the husband's property. (D. 24, 1, 5, 13; D. 24, 1, 5, 14.)

Either husband or wife may grant to the other, as a gift, a burial-place. (D. 24, 1, 5, 8; D. 24, 1, 5, 9.) A gift to a wife of a valuable tombstone is not void, but the property in it remains in the husband until a dead body is placed there, and the place becomes devoted. The gift does not enrich the wife. (D. 24, 1, 5, 10.)

A husband may present a slave to his wife with a view to manumission, although indirectly this was a gift of the valuable rights of patronage. (C. 5, 16, 22; D. 24, 1, 9, 1.)

Either husband or wife may have the use of the other's slaves, or of a dwelling-house, gratuitously. (D. 24, 1, 8.)

Either party may surrender to the other a thing pledged to the other without a consideration, the debt not being thereby extinguished. (D. 42, 8, 18.)

Gifts by a wife to her husband, to enable him to acquire any public dignity, are valid. Hence gifts to defray the expenses of standing for office or of the games. (D. 24, 1, 42; D. 24, 1, 40.)

Confirmation of invalid gifts.—The prohibition did not extend beyond the lifetime of the parties; after the marriage was at an end, gifts might take effect. Therefore, just as a gift made before marriage, to take effect only after marriage, was declared void, so a gift during marriage to take effect after the marriage was dissolved by the death of one of the parties, was valid. (D. 39, 6, 43; D. 24, 1, 9, 2; D. 24, 1, 11, pr.) A husband or wife, therefore, having made gifts to the other, could confirm them by Will. It became usual to insert in wills a clause to that effect, when it was desired that gifts made during marriage should be retained. At length Antoninus, before coming to the throne, in the reign of Severus, carried a *Senatus Consultum* to the effect that all gifts invalid during the marriage should become valid on the death of the donor, unless expressly revoked during life, or by testament. (D. 24, 1, 32, 2.) A question, however, arises where property was not given, but only a promise made. Can the promise be enforced against the heir of the deceased? There was a difference of opinion between the two great classical jurists, Papinian and Ulpian. Papinian held that the *Senatus Consultum* applied only to gifts of things, and that an invalid promise was not made obligatory by the

death of the promiser. (D. 24, 1, 23.) Ulpian, however, explicitly held that a stipulation, for example, for an annuity, could be enforced after the death of the promiser, if he had not withdrawn from it in his lifetime. (D. 24, 1, 33, pr.; D. 24, 1, 33, 2.) Justinian decided not merely that all such promises should be enforced, but that even a mortgage or pledge by the husband of the things promised should not be considered an implied revocation of the gifts. (Nov. 162, 1.) Previous to this time pledging a thing had been construed as a tacit revocation. (C. 5, 16, 12; D. 24, 1, 32, 5.)

In certain cases, however, death did not operate as a ratification.

(1.) If the parties were divorced, or even permanently separated without a formal divorce, and not re-married before death. (D. 24, 1, 62, 1; D. 24, 1, 32, 1; D. 24, 1, 32, 19.)

(2.) If the donee or receiver of the gift died first, or were reduced to slavery. (D. 24, 1, 32, 6; D. 24, 1, 32, 18.)

(3.) Such confirmed gifts were subject to the rules applicable to gifts made *mortis causa*. Therefore both donor and donee must have a capacity to give and receive at the time of death. (C. 5, 16, 24; D. 24, 1, 32, 7; D. 24, 1, 32, 8.)

(4.) Justinian, in the Code, required the gift to be expressly confirmed by will if it exceeded the amount that required registration; but the provision was repealed in the Novels. According to the latest law, such gifts took effect up to the amount that did not require registration, but beyond that amount were invalid. (C. 5, 16, 25; Nov. 162, 1, 2.)

EXTENSION OF INVESTITIVE AND TRANSVESTITIVE FACTS.

We may, with Savigny, regard Agency as an extension of investitive and transvestitive facts. It is convenient, in the first instance, to assume that a transvestitive fact operates universally—that anybody may become the owner of anything. Thereafter the qualifications to which this statement is subject may be enumerated,—the persons that cannot be owners, and the things that cannot be the objects of ownership. But the transvestitive facts admit of extension as well as restriction. Thus, if A mancipates a slave to B, B becomes owner, and that is the simple form; but if, in consequence of the mancipation, not B, but C becomes owner, then we have a transvestitive fact operating in favour of C, who has taken no part in the transaction. We may regard this as an extension of the simple transvestitive fact.

Did the Roman Law recognise any such extension—any agency? In answering this question a distinction of much importance and constant recurrence appears in view. It is that between the old formal and the newer non-formal modes of conveyance. In respect of the former, no agency was possible except through slaves or persons in an analogous state; but in respect of the informal modes of conveyance, such as delivery, agency was permitted universally.

I. Agency in respect of the formal transvestitive facts.

We acquire things not only ourselves directly, but also by means of those that we have in our *potestas* [*manus* or *mancipium*], and also of those slaves in whom we have a usufruct; and, further, of freemen or slaves belonging to others that we possess in good faith. Let us look into these cases narrowly one by one. (J. 2, 9, pr.; G. 2, 86.)

1. SLAVES and persons subject to *potestas*, *manus*, or *mancipium*.

And, further, all that [your children in *potestate*, and all that] your slaves [receive by *mancipatio* or] obtain by mere delivery (*traditio*), all rights that they acquire by stipulation or on any other ground whatever, all are acquired for you, and that though you know it not, or even against your will: for the slave that is in your *potestas* can have nothing of his own. And, therefore, if he is appointed heir, he cannot enter on the inheritance except at your bidding; and if at your bidding he does enter, it is for you he acquires the inheritance, just as if you had been appointed heir. And so also with a legacy. (J. 2, 9, 3; G. 2, 87.)

But we must bear in mind that when a slave belongs to one man in *bonis*, and to another *ex jure Quiritium*, all that is acquired through that slave, on any ground, goes to the owner in *bonis*. (G. 2, 88.)

And not only property (*proprietas*) is acquired for you by persons in your *potestas*, but also possession. For when they have gained possession of a thing, that possession is held to be yours. And thus, by means of them, the time for *usucapio* or *longi temporis possessio* begins to run. (J. 2, 9, 3; G. 2, 89.)

But as regards persons in *manu* or in *mancipio*, though by means of them you acquire property on any ground, just as through persons in your *potestas*, yet, whether you acquire possession is usually questioned, because they themselves are not in your possession. (G. 2, 90.)

2. Slaves possessed in good faith.

The same decision has been come to with regard to a person in good faith in your possession, and that whether he is free or another man's slave. For the decision as to him that has the usufruct holds with regard to the possessor in good faith too. All he acquires, therefore, on any ground outside those two, belongs either to himself if he is free, or to his master if he is a slave. (J. 2, 9, 4; G. 2, 92.)

"Outside those two."—For the meaning of this, see the following extract, "3. Slaves held in usufruct."

But if the possessor in good faith has come by *usucapio* to own the slave, and thus to be his master, then all the slave acquires on any ground goes to him as his master. (J. 2, 9, 4; G. 2, 93.)

But he that has the usufruct cannot become owner by *usucapio*; in the first place, because he is not possessor, but has only the right of use and enjoyment; and in the second place, because he knows that the slave belongs to another. And it is not property alone that you acquire by means of slaves in whom you have a usufruct or who are in good faith in your possession, or by means of a free person in good faith in your service, but possession as well. With regard to the person of both slaves and freemen, we speak in accordance with the limitation just set forth; viz., that the possession must have been gained by them either with your property or by their own exertions. (J. 2, 9, 4.)

3. Slaves held in usufruct.

As regards slaves held by you only in usufruct, it has been decided that all they gain with your property or by their own exertions is added to your estate: but all they gain on other grounds than those belongs to the master that owns them. And therefore if such a slave is appointed heir, or any legacy is left him, or gift bestowed on him, it is acquired not for the man that has the usufruct, but for the master that owns him. (J. 2, 9, 4.)

II. Non-formal transvestitive facts.

From all this, then, it appears that through freemen neither subjected to your power nor possessed by you in good faith, and also through other men's slaves in whom you have neither the usufruct nor lawful possession, you can in no case acquire. And this is the meaning of the saying that through an outsider nothing can be acquired.

To this there is one exception. For it is held that through a free person—a procurator, for instance—you can acquire possession, not only knowingly, but even in ignorance, as was settled by a constitution of the late Emperor Severus. And by possession of this sort you acquire ownership even, if it was the owner that delivered the property; or if not, you can acquire it by *usucapio*, or *longi temporis praescriptio*. (J. 2, 9, 5; G. 2, 95.)

It makes no difference whether the owner in person delivers the property to another, or whether some one else delivers it by his wish. (J. 2, 1, 42.)

And on this principle, if any one is allowed by the owner to manage his business freely, and he in the course of business sells goods and delivers them, he thereby makes them the property of the receiver. (J. 2, 1, 43.)

Illustrations.

Titius and Gaius bought land, which was delivered to Titius partly for himself and partly as the agent of Gaius. By this delivery Gaius becomes part owner of the land. (D. 41, 1, 20, 2; C. 4, 27, 1; C. 7, 32, 8.)

Sempronius takes delivery of a slave from Maevidius with the intention of holding it for Julia. Julia afterwards hears of the transaction. From that moment she begins to acquire by *usucapio*. (C. 7, 32, 1.)

Titius, the agent of Julius, at his request buys a farm, and takes delivery of it in the name of Julius. That delivery immediately vests the ownership in Julius, even before he knows that the delivery has actually taken place. (D. 41, 1, 13, pr.) If, however, Titius bought the farm without any special order, Julius does not become owner until he hears of the transaction, and ratifies it. (D. 41, 2, 42, 1.)

The distinction between formal and non-formal Investitive Facts pervades the whole Roman Law. It appears in the manu-

mission of slaves, adoption, conveyance of property, contract, inheritance, and procedure. Everywhere the Roman Law presents the same characteristics. In antiquity it was characterised by a spirit of intense formalism—a spirit emulated by the jurists in the narrow pedantry of their interpretation. The forms or ceremonies had doubtless at some remote period a real significance, if for nothing else, as symbolising an almost superstitious reverence for law. These forms had also a marked utility among a people to whom the art of writing was unknown as an instrument in the transactions of daily life. It followed that no one could be affected by the forms except the persons that actually took part in the ceremony. Hence the general rule, that in no legal transaction could one freeman represent or act for another. The only exception was in the case of slaves, and other persons subjected to a qualified ownership. But in the course of time, as the law paid less attention to forms, and more to the meaning and intention of parties, the rule of the civil law was felt as an inconvenience as well as an anomaly. Thus it was held that any one could acquire possession by another, so that the possession of A should be held to be the possession of B. In the later period of the Roman Law delivery of possession (*traditio*) became the exclusive mode of conveying property; and thus, as Justinian states, ownership could be acquired not only by slaves, but by any free person.

REMEDIES.

A. REMEDIES IN RESPECT OF RIGHTS AND DUTIES.

First, Rights to moveables. (*Res se moventes*, and *res mobiles*.)

I. THEFT—*Actio Furti*. This is the remedy against the thief. It is concurrent with other actions, such as the ordinary actions for recovering ownership (*vindicatio*, *actio ad exhibendum*), but generally these would only be resorted to when the stolen article (*res furtiva*) was in the possession of a person innocent of the theft. The *actio furti* is cumulative with the *condictio furtiva*, an action whose characteristics will be presently described. (D. 13, 1, 7, 1.)

The *actio furti*, whether brought for twofold or for fourfold the loss, looks only to the recovery of the penalty. For the recovery of the thing itself the master has a remedy outside this—by *vindicatio*, namely, or *condictio*. *Vindicatio* is the remedy against the possessor, whether that is the thief or some one else. *Condictio* lies against the thief himself or his heir, although he is not the possessor. (J. 4, 1, 19.)

1. The penalty for theft varied according as the thief was or was not caught in the act. Hence a distinction between manifest and non-manifest theft. (*Furtum manifestum* and *nec manifestum*.) The standard of punishment was thus determined with

a regard to the feelings of vengeance that might be expected to actuate a sufferer taking into his own hands the punishment for the depredations on his property.

The penalty for a thief taken in the act (*manifesti furti*) was by the statute of the XII Tables capital. For a freeman was scourged, and adjudged to him from whom he had stolen. But whether he was made a slave by being so adjudged, or was put in the position of a debtor assigned to a creditor (*adjudicatus*), was a question among the older writers. A slave, again, was scourged in like manner and put to death. But afterwards the harshness of the penalty was censured; and for a theft by a slave as well as by a freeman the remedy fixed by the Praetor's edict was an action for fourfold the amount. (G. 3, 189, 190.)

For a thief not taken in the act (*nec manifesti*), the penalty imposed by the statute of the XII Tables was an action for twofold the amount; and this the Praetor retains. (G. 3, 190.)

The penalty for theft is, where the thief is taken in the act—fourfold, whether he be slave or free; where he is not—twofold. (J. 4, 1, 5.)

What is manifest theft (*Furtum manifestum*)?

Furtum manifestum, some have said, is theft detected while it is still being committed. Others go further and say that it is theft detected while the thief is still on the spot where it is committed: for instance, if olives are stolen in an olive-grove or grapes in a vineyard, as long as the thief is in that olive-grove or vineyard; or if in a house, as long as the thief is in that house. Others again go still further, and say that a theft must be called *manifestum* if detected before the things stolen have been carried to the place where the thief meant to carry them. And others, going further still, say whenever the thief is seen holding the thing stolen. This last opinion has not been accepted. And even the opinion of those that think that until the things stolen have been carried to the place meant for them by the thief, the theft, if detected, is a *furtum manifestum*, has been disapproved by most. For it raises doubts as to the limit of time to be set, whether one day or more; a point that comes in, because often the thief means to carry things stolen in one State into other States or provinces. Therefore, of the two opinions first stated, one or other is the approved one; and most prefer the latter. (G. 3, 184.)

A *fur manifestus* is what the Greeks call ἐν αὐτοφώρῳ. And the term includes not only the thief taken in the very act, but also the thief taken on the spot where the theft is committed; for instance, if he has committed a theft in a house, and is taken before he goes out of the door; or in an olive grove, or vineyard of olives or grapes, and is taken while still in that olive grove or vineyard. And even further than this the term *furtum manifestum* must be extended. For so long as the thief is seen or taken still holding the thing stolen, and that whether in private or in public, by its owner or by any one else, before he has reached the place where he meant to carry the thing and lay it down, he is a *fur manifestus*. But if he has carried it to the point to which he meant to carry it, although he is taken with the thing stolen in his possession, he is not a *fur manifestus*. (J. 4, 1, 3.)

What *furtum nec manifestum* is, appears from what we have said. For all that is not *manifestum* is *nec manifestum*. (J. 4, 1, 3; G. 3, 185.)

The penalty was double or quadruple—what? A difference existed when the owner (*dominus*) sued the thief, and when any other person interested in the property did so.

(1.) The owner, as a general rule, was confined to the price or real value of the stolen property. (D. 47, 2, 80, 1.) (*Non quod interest, sed rei verum pretium.* D. 47, 2, 50.)

(2.) A person, not an owner, having a right to sue a thief, recovers double what he loses by the theft, not twice the worth of the article stolen. (D. 47, 2, 80, 1.)

A's female slave is stolen from him and sold by the thief to B, an innocent purchaser, who gives the thief two *aurei*. The slave is again stolen by Attius, who is sued both by A and B. What penalties will each recover? A obtains double the value of the slave, B double the value of his interest (*duplum quanti ejus interest*). The owner measures by the ownership, the possessor by the possession. (D. 47, 2, 74.)

The value of the thing, if it afterwards perishes or is deteriorated, is taken as it was at the time of the theft. But if its value is enhanced between the time of the theft and the commencement of the action, its *maximum* value is taken. (D. 47, 2, 50.)

Thus, a thief steals a child, and is sued by the owner when the child has grown up: the measure of damages is not the value of the child, but the highest value of the adult; because it would be monstrous to give the thief the benefit of any change resulting from his own wrong. (D. 47, 2, 67, 2.)

The owner, also, can add remote damages.

Thus, A has sold an article to B, which he is bound to give to B by a day named under a penalty. Before the day, the article is stolen, and A has to pay the penalty. He recovers from the thief twice what he has had to pay. (D. 47, 2, 67, 1.)

A slave instituted heir is stolen. The thief must pay twice the value of the inheritance, as well as twice the value of the slave. (D. 47, 2, 52, 28.)

When securities are stolen (*tabulae vel cautiones*), the thief must pay double or quadruple, not merely the value of the material, but of the sums for which the documents were the securities. (D. 47, 2, 27.) It makes no difference if the documents are cancelled (D. 47, 2, 82, 3), unless there is other valid evidence. (D. 47, 2, 27, 2.)

2. The *actio furti* may be brought by the heirs of the injured person, but not against the heirs of the thief, because the action is penal. (D. 47, 2, 41, 1; C. 6, 2, 15.)

3. Aggravated theft. (*De incendio, ruina, naufragio, rate, nave expugnata.* (D. 47, 9.)

When the theft was committed from a building on fire, a house fallen down, a shipwreck, or a boat or ship attacked by force, the thief was liable to a fourfold penalty if the action were brought within the year, but after that time only to a single penalty. The words of the edict are given. (D. 47, 9, 1, pr.)

The Praetor says—If it is alleged that a man, after a fire, the fall of houses, or a shipwreck, or by the violent capture of a boat or ship, has carried off any plunder, or has wilfully resettled it, or has under these circumstances inflicted any damage on any one, against that man I will give a remedy—if within a year from the first time there is power to try the case, then for fourfold the loss; if after a year, then for the loss simply.¹

The edict also includes buildings adjacent to those that are burned or have fallen down. (D. 47, 9, 1, 3.)

Naufragium includes what is cast ashore at the time of a wreck, but not when an interval has elapsed. (D. 47, 9, 2; D. 47, 9, 5.) What is stolen on the shore, not

¹ Praetor ait: "In eum qui ex incendio, ruina, naufragio, rate, nave expugnata, quid rapuisse, recepisse dolo malo, damnum quid in his rebus dedisse dicetur, in quadruplum in anno, quo primum de ea re experiundi potestas fuerit: post annum in simplex iudicium dabo."

under the excitement of the shipwreck, falls under the head of simple theft. (D. 47, 9, 3, pr. ; D. 47, 9, 3, 6 ; D. 47, 9, 4.)

Rate vel nave expugnata is when a boat or vessel is attacked by pirates or robbers, and things are stolen either by them or by others under cover of the tumult. (D. 47, 9, 3, 1.)

II. Other actions in case of theft.

Of thefts there are [according to Servius Sulpicius and Masurius Sabinus, four kinds, *manifestum* and *nec manifestum*, *conceptum* and *oblatum*. But Labeo makes] two kinds only, *manifestum* and *nec manifestum* ; for *conceptum* and *oblatum* are rather species of procedure attaching to theft than kinds of thefts. [And this is certainly the truer view, as will appear below.] (J. 4, 1, 3 ; G. 3, 183.)

1. *Furtum conceptum*. An action against the possessor (whether innocent or not) of stolen goods.

The term *furtum conceptum* is applied when in a man's house, before witnesses, something that has been stolen is sought and found. For against him there is a special action, even although he is not the thief, called the *actio (furti) concepti*. (J. 4, 1, 4 ; G. 3, 186.)

2. *Furtum oblatum*. Imposing stolen goods on one to escape the former action.

The term *furtum oblatum* is applied when something that has been stolen is brought to you by some one, and is found on formal search in your house, especially if brought to you with the intention that it shall be found in your house and not in the giver's. For you, in whose house it is found upon a formal search, have a special action against the man that brought it, although he may not be the thief. And this is the *actio oblatis*. (J. 4, 1, 4 ; G. 3, 187.)

The penalty in the *actiones concepti* and *oblatis* is by the statute of the XII Tables threefold. And the same penalty is still enforced by the Praetor. (G. 3, 191.)

3. *Actio prohibiti furti*. Resisting the search for stolen goods.

There is also an *actio prohibiti furti* against the man that prevents another when wishing to search for stolen goods. (G. 3, 188.)

This *actio prohibiti* is for a fourfold penalty, and was brought in by the Praetor's edict. But the statute fixes no penalty on that account ; it only orders the man that wishes to search to go naked to the search, girt with a linen girdle and holding a flat dish ; and if he finds any stolen goods, the statute declares it a case of *furtum manifestum*. (G. 3, 192.)

What the linen girdle is has been questioned. But the truer view is that it is a kind of decent covering for the man's loins. And so the whole statute is absurd. For the man that prevents another from searching with his clothes on, will also prevent him from searching with his clothes off ; and all the more that if the thing is sought and found in that fashion, he will be made liable to a greater penalty. And again, it is absurd to order him to hold a flat dish. For whether the aim was to keep the hands of the holder engaged so that he could not slip in anything, or to supply him with a dish whereon to place what he found, neither aim is attained if the thing sought for is of such a size or nature that it could neither be slipped in

nor placed upon the dish. This assuredly is undoubted, that a dish of any material satisfies the statute. (G. 3, 193.)

Yet because the statute ordains that a theft so discovered (viz., by the search *lance et licio*) is a *furtum manifestum*, there are some writers that say that *furtum manifestum* is of two kinds—statutory and natural; statutory being that of which we are speaking; natural, what we have set forth above. But in truth *furtum manifestum* is natural; for no statute can turn a *fur nec manifestus* into a *fur manifestus* any more than it can turn him that is no thief into a thief, or him that is not an adulterer or a man-slayer into an adulterer or man-slayer. But what the statute can do is this—it can ordain that a man shall be punished exactly as if he had been guilty of theft or adultery or manslaughter, although really guilty of none of them. (G. 3, 194.)

There is also an *actio prohibiti furti* against the man that prevents another from searching for stolen goods when he wishes to do so in the presence of witnesses. Besides, a penalty is fixed by the Praetor's edict to be enforced by the *actio furti non exhibiti* against the man that has not produced stolen goods, when sought for and found in his possession. (J. 4, 1, 4.)

But these *actiones*, *furti concepti*, *furti oblati*, *furti prohibiti*, and also *furti non exhibiti*, have fallen into disuse. For the search for stolen goods is not now-a-days conducted with the old formalities. And rightly, therefore, as a result of this, the actions just spoken of have passed out of common use. For it is plain beyond all dispute that all that knowingly receive and hide stolen goods are liable to the *actio furti nec manifesti*. (J. 4, 1, 4.)

4. *Condictio furtiva*. For the recovery of stolen goods.

Since actions are thus distinguished, it is certain that the plaintiff cannot demand what is his from another by the formula, "*Si paret eum dare oportere*" (if it appears that he ought to give it). For it cannot be said that what is the plaintiff's ought to be given him; for when a thing is given to any one, what is meant is that it is given him to make it his; and what is already the plaintiff's cannot be made any the more his. Plainly from hate of thieves, however, and to make them liable to more actions, it is provided that beside the penalty of twofold or fourfold damages in order to regain the thing, thieves should be liable to this action too, "*si paret eos dare oportere*," and that although there lies against them the *actio in rem* also by which a man claims what is his own. (J. 4, 6, 14; G. 4, 4.)

The only person that could bring this action was he that was owner of the thing at the time the action was brought. (D. 13, 1, 1; D. 13, 1, 10, 2.) It may be brought against the heirs of the thief. (D. 13, 1, 5; D. 13, 1, 7, 2.)

In another respect it differs from the action for theft; namely, that if any one of several accomplices is sued, the rest escape. (C. 4, 8, 1.)

The defendant is bound to restore the thing if he has it, or to pay its value if he has not. (C. 4, 8, 2; D. 13, 1, 8, 1; D. 13, 1, 13; D. 13, 1, 3.)

III. Robbery. *Actio Vi Bonorum Raptorum*.

1. Penalty.

The *actio vi bonorum raptorum* if brought within a year is for fourfold, after a year for the direct loss only. And this is an *actio utilis*, available even if the robber has taken but one thing, and that the most trifling. The fourfold claim, however, is not wholly penal; for it includes beside the

penalty the recovery of the thing taken, just as in the *actio furti manifesti* of which we have spoken. In the fourfold amount, then, the recovery of the thing is included, so that the penalty is threefold, and that whether the robber is arrested in his wrong-doing or not. For it is absurd that a robber by force should get off more lightly than a thief by stealth. (J. 4, 2, pr.)

It must also be remembered that a robber is necessarily a manifest thief, because the exercise of violence implies resistance. (D. 47, 2, 80, 3.)

IV. Damages. *Damnum injuria.*

This action may be brought alternately with a criminal prosecution.

It is open to him whose slave has been killed both to proceed at private law for the damage done (under the *lex Aquilia*,) and to charge the slayer with a capital crime. (J. 4, 3, 11 ; G. 3, 213.)

1. The measure of damages.

1st Chapter of the *lex Aquilia*.

These words in the statute, "the highest value he bore within a year," mean, that if any one kills a slave of yours that at the time limps or is blind of an eye, or maimed, but within a year of his death was sound and valuable, then the slayer is bound to pay not the value at the time, but the highest value the slave bore within the year preceding. And so one is liable not merely for the loss he has inflicted, but sometimes for far more. And on this ground it is believed that the action under this statute is penal. It is agreed, therefore, that it cannot pass so as to be brought against his heir. It would, however, have passed if damages were never given beyond the actual loss. (J. 4, 3, 9 ; G. 3, 214.)

3d Head of the *lex Aquilia*.

It is manifest that, as under the first chapter, a man is liable if by his *dolus* or *culpa* a man or a fourfooted beast is killed ; so under this chapter he is liable for all other damage caused by his *dolus* or *culpa*. (J. 4, 3, 14.)

But under this chapter the amount of damage in which the wrongdoer is condemned, is the value within the last thirty days, not within a year. And even the word "highest" is not added. [Some writers, therefore, of the opposite school, have thought that, in so far as relates to the last thirty days, the Praetor was free to insert in the *formula* the day on which the thing was of most value, or another on which it was of less.] But Sabinus rightly decided that the damages must be reckoned just as if here too the word "highest" had been added. For the [lawgivers] Roman commons, who on the proposal of the tribune Aquilius passed this statute, contented themselves with using the word in the first part. (J. 4, 3, 15 ; G. 3, 218.)

Common to both chapters ; remote damages.

It has been decided, not by the express wording of the statute, but as a matter of interpretation, that the judge must reckon, as we have said, not the mere value of the body that is cut off, but further, all the damage over and above that is done you by the cutting off of that body.

[If by the killing of another's slave the master suffers damage greater than the price of the slave, that too is reckoned.]

If, for instance, some one appoints your slave his heir, and before the

slave enters, by your orders, on the inheritance, he is killed ; then it is agreed that in reckoning the damage the loss of the inheritance must be taken into account.

And, again, if one of a pair of mules or of a team of four horses, or one of twins, is killed, or one slave out of a band of comedians or singers, the reckoning includes not only the person killed, but in addition the depreciation in value of the rest. (J. 4, 3, 10 ; G. 3, 212.)

The MEASURE OF DAMAGES is the loss sustained by the negligence or wrongful act of defendant (*quanti interfuit non esse occisum*). (D. 9, 2, 21, 2.)

A slave whom his owner is bound under a penalty to give to a purchaser is killed. This penalty is the measure of loss, if the slave is wrongfully killed before the day he is to be delivered. (D. 9, 2, 22.)

A slave has committed great fraud in his accounts with his master, and the master intends to put him to the torture to discover his accomplices. Before doing so, however, the slave is killed. The measure of damages is the value of the discovery to be made by the torture of the slave, and not merely the market value of the slave. (D. 9, 2, 23, 4.)

The damage must, however, be certain. Thus the measure of damages in destroying nets is not the possible capture of fish, but merely the value of the nets ; because that is the only quantity capable of being determined. (D. 9, 2, 29, 3.)

A *pretium affectionis* was not recognised. Thus, if the slave killed happened to be a natural son of his owner, no increase of damages could be obtained. (*Pretia rerum non ex affectione, nec utilitate singulorum, sed communiter fungi.*) (D. 9, 2, 33.)

2. A defendant denying his liability was subject to a penalty of double damages. (D. 9, 2, 23, 10 ; C. 3, 35, 4.)

3. The action is given to, but not *against*, the heirs, unless in so far as the heir of the defendant has been enriched by the wrongful act or negligence. (D. 9, 2, 23, 8.)

Second, Duties in respect of self-moving things (res se moventes).

I. *Pauperies.* The *actio de pauperie* is noxal (*noxalis actio*) ; that is, it imposes an alternative duty on the owner of cattle that has done damage either to surrender the animals or pay the damage. It dates from the XII Tables. (D. 9, 1, 1.) The action lies only against the owner (*dominus*), and may be brought, not only by the owner of the thing injured, but by the borrower of it, or other persons interested in it. (D. 9, 1, 2.) It is given to the heirs of the injured party, and also against the heirs of the owner of the animal that did the injury, if they are owners by right of succession. (D. 9, 1, 1, 17.)

If the defendant in an action *de pauperie* denies the ownership, and it is proved against him, he must pay double the damage. (D. 9, 1, 1, 15.)

II. The action for double penalties on the edict of the *Ædiles* being penal could be brought by the heirs of the sufferer, but not against the heirs of the wrongdoer.

Third, Protection of rights to immoveables (res immobiles).

I. *Actio de termino moto.*

1. The penalty was 50 *aurei* for each stone removed, and went to the *fiscus*.

2. The action was *popularis* ; i. e., any one could bring the action, whether the person injured or not.

II. Ejectment by force. Interdict *de vi et vi armata*. (D. 43, 16.)

What penal actions were to moveables, interdicts were to immoveables. The difference in the remedy arises from the difference in the thing. Moveables can be furtively abstracted ; immoveables hardly, except by removing landmarks. The interdict by which possession was restored to a person that had been disturbed by force, served the same purpose as the action *vi bonorum raptorum* for the robbery of moveables. In the case of land, the effect of violence is simply to remove the possessor, not to take away the land. That can always be found, and is beyond the reach of the robber. Hence,

while in robbery the law regards the act of violence as having accomplished its object, and as beyond recall, and attempts only to apply a very strong motive to all men to refrain from the like acts, in the violent dispossession of immoveables it keeps less in view the punishment of the wrongdoers than the restitution of the possessor. It proceeds not by penal actions, but by supplying a complete remedy to the sufferer.

1. The object of the interdict is restitution of the possessor; that the defendant shall peaceably suffer the possessor to resume possession. (D. 43, 16, 1, 42.) If the defendant has himself lost possession, he is condemned to pay a sum compensating the possessor for his loss. (D. 43, 16, 15.) Although the interdict is primarily applicable only to immoveables, yet, if restitution is ordered, it will include all the moveables on the land at the time of ejectment. (D. 43, 16, 1, 32-33.) The dispossessor is also compelled to restore the fruits he has, or ought to have, gathered. (D. 43, 16, 1, 40-41.)

2. The interdict may be brought by the heirs of the person ejected (D. 43, 16, 1, 44), but not against the heirs of the dispossessor. The remedy against them is an *actio in factum* for the restitution only of what had fallen into their possession. (D. 43, 16, 1, 48; D. 43, 16, 3, 18.)

3. The interdict *de vi cottidiana* must be brought within a year from the ejectment (D. 43, 16, 1, 39; C. 8, 4, 2); but by a constitution of Constantine the time did not run against those who were absent. (C. 8, 5, 1.)

The interdict *de vi armata* could be brought at any time.

Justinian put both on this footing: that both interdicts could be given with all their consequences within the year; and after the year, only for that which came to the hands of the person who resisted the restoration of the possessor.

III. Offences against the use of an immovable.

1. *Actio arborum furtim caesarum*.

1°. Penalty. The XII Tables imposed a penalty of 25 *asses* for each tree. This fell into disuse, and its place was taken by the edict giving a penalty of double the damage sustained (D. 47, 7, 7, 7); i.e., double the loss that the damage causes the owner, including, therefore, more than the mere value of the trees destroyed. (D. 47, 7, 8.)

2°. Like all penal actions, it could be brought by, but not against, the heir.

3°. If there were more than one person concerned in the mischief, each must pay double the damage. (D. 47, 7, 6.)

4°. This action was concurrent with (1) *actio damni injuria*; (2) the interdict *quod vi aut clam* (D. 47, 7, 11); and (3) if the trees were cut down, *lucri faciendi causa*, the *actio furti* could be brought. (D. 47, 7, 8, 2.)

2. *Actio legis Aquiliae*—could be brought for injury to immoveables as well as to moveables.

3. The special remedy, however, for that purpose, was the interdict *quod vi aut clam*.

1°. The object of the interdict was restitutory. The wrongdoer was bound not only to permit the old status to be restored, but to pay the expense of doing so, and could be condemned in a sum compensating the sufferer for the wrong done. (D. 43, 24, 15, 7.) If the wrongdoer is not in possession, he is liable for the expense; if the person who is in possession was not the wrongdoer, then he is bound only to suffer restitution, not also to defray the cost. (D. 43, 24, 16, 2.)

2°. The interdict could be brought not only by the owner, but by any one that had an interest in preventing the objectionable acts. (D. 43, 24, 11, 14; D. 43, 24, 16, pr.)

3°. It could be brought by the heir, and against the heir to the extent of what was in his power to remedy. (D. 43, 24, 15, 3.)

4°. The interdict was only for one year (D. 43, 24, 15, 3); but the time did not run against minors, or those absent on the service of the State. (D. 43, 24, 15, 6.)

4. Interdict *uti possidetis*.

This interdict will be described in the proper place (*possessio*); but here it may be

referred to as occasionally employed in repelling attempts to interfere with an owner or possessor in the free use of his land. (D. 43, 16, 11.)

IV. Wrongs by adjoining proprietors.

1. Interdict *de arboribus caedendis*.—The object of this interdict is to compel the owner of trees overhanging his neighbour's land to cut them down, or to permit him to cut them down. (D. 43, 27, 1, 2.)

2. Interdict *de glande legenda*.—The object was to compel the owner of adjoining land to permit his neighbour to enter and collect fruits falling on it every third day.

3. *Actio aquae pluviae arcendae*.—This action is not *in rem*, but *in personam*, against him that, in respect of *aqua pluvia*, has violated his neighbour's rights. (D. 39, 3, 6, 5.)

It could be brought only by the owner of the injured land, and only against the owner of the land from which the damage issued. (D. 39, 3, 3, 4.) If a tenant committed the wrong, the remedy is the interdict *quod vi aut clam*. (D. 39, 3, 5.) But a *utilis actio (aquae pluviae arcendae)* was given to and against the usufructuary and the *emphyteuta*. (D. 39, 3, 23, 1 ; D. 39, 3, 22, pr. ; D. 39, 3, 22, 2.)

If the owner has done the wrong, he must undo it at his own expense ; if he has not wilfully done it, he must permit the injured person to remove the grievance. (D. 39, 3, 6, 7.) The defendant is only answerable for damage accruing after the *lis contestata*, not before ; the proper remedy in that case being the interdict *quod vi aut clam*. (D. 39, 3, 6, 6 ; D. 39, 3, 6, 8 ; D. 39, 3, 14, 3.)

The heir of the wrongdoer may be sued. (D. 39, 3, 6, 7.)

B. REMEDIES FOR INVESTITIVE, TRANSVESTITIVE, DIVESTITIVE FACTS.

First.—ACCESSION.

I. *Actio de tigno juncto*. This action was given by the XII Tables against a person that had built on his own land with the material that he knew belonged to another. (D. 47, 3, 1.)

II. The *exceptio doli mali* was the only means by which an innocent possessor could recover what he had fixed to another's land. It was thus no action, but only a defence.

Second.—TRANSVESTITIVE FACTS.

1. *Vindicatio*.

Hitherto, in the remedies that have been enumerated, it has been assumed that there was no dispute as to ownership ; that being admitted, the only question was by what means the undoubted owner could assert his rights against those that infringed them, but without setting up a rival title of their own. We now come to the action in which the question of ownership itself could be tried ; when the point to be determined is simply which of two or more claimants is the owner of the property in dispute. In this controversy the real issue raised was whether an investitive or transvestitive fact existed in favour of the claimant ; and thus we have to examine the means by which an investitive or transvestitive fact was established in law.

The *vindicatio* was the same whether it applied to moveables or immoveables (D. 6, 1, 1, 1) ; but it was not the proper remedy in the case of persons under the *potestas* (D. 6, 1, 1, 2) ; nor did it apply to disputes concerning sacred or religious places (D. 6, 1, 23, 1) ; nor to those other forms of ownership that have been described with their appropriate remedies.

1. Only the owner (*dominus*) can bring the *vindicatio*. (D. 6, 1, 23.) The person invested with the ownership may bring this *vindicatio*, although by a condition annexed to the investitive fact he is liable to be divested of it at a future time. (D. 6, 1, 41 ; D. 6, 1, 66 ; D. 50, 17, 205.)

A person not actually invested with the ownership, although he is in a position to demand investiture, cannot bring the *vindicatio*. Thus a purchaser, before the article

bought has been actually delivered to him, is confined to his action against the vendor, and cannot by *vindicatio* recover the thing itself. (D. 6, 1, 50.)

2. Only the person in possession of the thing sued for is the proper defendant in a *vindicatio*. (C. 3, 19, 1.) In this instance the word *possessor* is used in its largest signification, including not only such a possessor as could protect himself by interdict, but any one that had physical control over the thing, and could restore it. (D. 6, 1, 9.) To prevent injustice, by the setting up of a sham possessor to defeat the true owner, special precautions were required by a constitution of Constantine in the case of immovables. If the possessor of an immovable were not the true owner, he ought at once to state in court the name of the real owner; whether such owner lived in the same city, or in the country, or in another province. The possessor is thereupon regarded as out of the suit, and the owner is, within a time to be named by the judge, to be summoned to appear; and if he fails, the plaintiff is to be put in possession—reserving, however, leave to an absent owner to reopen the question. (C. 3, 19, 2.)

A possessor, who handed over the property to another to avoid judgment, was regarded as still in possession, because, to use the quaint phraseology of Paul, the fraud is tantamount to possession (*pro possessione dolus est*). (D. 50, 17, 131.) A possessor is also responsible if he has lost the thing, not intentionally, but through negligence; thus, if he has sent a ship to sea insufficiently equipped, and it is wrecked. (D. 6, 1, 36, 1.)

3. Where must the *vindicatio* be brought? Generally speaking, an action must be brought in the jurisdiction within which the defendant lives (*Actor rei forum, sive in rem, sive in personam sit actio, sequitur*), (C. 3, 19, 3); but in actions *in rem* the action was required to be brought in the place where the property was situated. (C. 3, 19, 3.)

4. Steps preliminary to the suit.

Anciently, the elaborate introduction of the *sacramentum* prefaced every suit for ownership, but that fell into disuse; and indeed, in later times, the *vindicatio* itself was very much thrust into the background. The history of this point cannot well be understood until the history of *possessio* is examined; but the following facts may be here noted. The burden of proof rested upon the claimant (*petitor*); the defendant was not bound to show that he had any title whatever. (C. 3, 31, 11.) The defendant had therefore an enormous advantage, because, unless the *petitor* conclusively established his right, he lost his action. Possession was thus made worth, if not nine, at all events a considerable number of points of the law. The contest then began for the possession. The owner tried by means of an interdict to regain possession; and if he succeeded in that step, he seldom required to do anything more. It was only when the owner had neglected his claim, or for any other reason could not demand an interdict, that he was obliged to appear as claimant (*petitor*) in the *vindicatio*. (D. 6, 1, 24.) Now, what the interdict was to immovables, that the *actio ad exhibendum* was to moveables. The purport of this action was simply to have the property in dispute produced in court; but as no one could succeed in that who could not show some interest in the property, the question of ownership was virtually raised, and often practically decided, in the preliminary action. Such was not its ostensible object, for in reality the *actio ad exhibendum* was only a personal action, not an action *in rem* (D. 1^o, 4, 3, 3); but it was a preliminary that often rendered it unnecessary to take any further steps.

In an *actio ad exhibendum* (for production) it is not enough for the defendant to produce the object, but he needs must produce also all that appertains to it (*causa rei*). In fact, the plaintiff must have it in the same condition as he would have had, if the thing had been produced and handed to him when first he brought the *actio ad exhibendum*. And, therefore, if by means of the delays between, the possessor has acquired the

thing by *usucapio*, yet none the less he shall be condemned to restore it. And, besides, the judge ought to take account of the fruits yielded during the interval—during the time, that is, between the plaintiff's receiving leave to go before a judge and the giving of the decision. If, however, the defendant denies that he can produce the thing at present, and asks time to do so, and that seemingly not with intent to hinder justice, then time ought to be given him; provided always that he gives security that he will make restitution. But if he neither produces the thing at once in obedience to the order of the judge, nor gives security that he will do so hereafter, then he must be condemned to pay a sum representing the plaintiff's interest in having the thing produced from the very first. (J. 4, 17, §.)

5. The judgment.—The chief object of the *vindicatio* was the restitution of property to the owner. If the possessor refuses to deliver up the property when judgment is given against him, the successful litigant will be put in possession by force (*manu militari*). If the possessor has fraudulently given up the thing to another, and is therefore unable to restore it, he is condemned in a sum which is fixed by the oath of the demandant (*petitor*); if he is unable to give it up from causes other than fraud, he is condemned in a sum fixed by the judge. (D. 6, 1, 68.)

Several other ends might be accomplished by the judgment. Thus if the possessor had injured the property, he was amenable to the *lex Aquilia*; but if the demandant chose, he might have the damage included in the judgment on surrendering his right to sue under the *lex Aquilia*. (D. 6, 1, 13; D. 6, 1, 14.) When a slave had been beaten, the same alternative was presented with the *actio injuriarum*. (D. 6, 1, 15.)

Fructus, Causa, Instrumentum.—The most important addition to the judgment in a *vindicatio* was the restitution of the fruits, produce, or other accessories accruing to the property during the time it remained with the possessor. Hence it occasionally happened that, even when the property had perished, judgment in a *vindicatio* could be given on account of the fruits or produce. (D. 6, 1, 16.)

Fructus was used in an extended sense, like *glans*. *Glans* properly is an acorn, but it was used as a name for every sort of fruit growing on plants, shrubs, or trees. (D. 50, 16, 236, 1.) So *fructus* was employed to signify not only fruits in general, but mineral produce and the young of animals. (D. 50, 16, 77.) It includes also (*fructus civiles*) the rents of houses. (D. 22, 1, 36.) Usury was not considered the *fructus* of money lent, because it did not arise from the money itself, but from a special agreement. (D. 50, 16, 121.)

Causa includes the offspring of a female slave, which, out of respect for humanity, was not treated as *fructus*. It applied also to any actions accruing to the owner of the slave, as an *actio legis Aquiliae*, for damage done to the slave. (D. 6, 1, 17, 2.) In the same manner, an inheritance or legacy given to a slave was considered *causa*. (D. 6, 1, 20.)

Instrumentum.—The *instrumentum* of a house is contrasted with ornament: it does not form part of a house, but is added to it by way of protection, chiefly from fire and tempest. (D. 33, 7, 12, 16.) The *instrumentum* of a farm is the implements required for obtaining and preserving the produce. (D. 33, 7, 8.) *Instrumentum* is distinguished from *pars fundi*, because not affixed to the soil. (D. 19, 1, 17.) In suing for a ship it was necessary to demand separately its *instrumentum*, rigging, tackle, anchors, ship's boats, &c. (D. 6, 1, 3, 1.)

To what extent then must the possessor restore not only the thing, but its *fructus*, *causa*, and *instrumentum*? The answer depends upon a distinction that has already been explained in its bearings on *accessio* and *usucapio*; namely, that between a *bona fide* and *mala fide* possessor. The *mala fide* possessor is bound to restore the thing with all its *fructus*, &c.; and not merely the *fructus* he has actually gathered, but what the owner could have enjoyed had he been suffered to possess his own. (D. 6, 1, 62, 1.)

The *bona fide possessor* is bound to restore all the produce in the same manner from the time of the *lis contestata* ; but before that time only those in existence, which have not been acquired by him by *usucapio*. (C. 3, 32, 22.) The *usucapio* runs from the moment the *fructus* are separated from the soil. (D. 41, 1, 48.) Thus, in effect, the *bona fide possessor* must restore all the *fructus* from a year before the *lis contestatio*, in so far as they exist, or have left him the richer.

And if the action is *in rem*, the duty of the judge is, if he decides against the plaintiff, to acquit the possessor ; but if against the possessor, to order him to restore the object in dispute and its fruits as well. If, however, the possessor affirms that he cannot restore it then, and asks for time to do so, seemingly with no intent to hinder justice, then the favour should be granted him ; provided always that he gives security both by himself and by a surety for the value of the object in dispute (*litis aestimatio*) if he does not restore it within the time given him. If it is an inheritance that is claimed, the same rules in regard to fruits are observed as those that come in, as we have said, in claims for single objects. Those fruits that by his own neglect (*culpa*) the possessor has not gathered, are treated pretty much the same in both forms of action, if the possessor was a robber. If, however, he was in possession in good faith, no account is taken of those that are consumed or ungathered. But account is taken from the date on which the claim first was made of those, that by the possessor's neglect either were not gathered, or were gathered and consumed. (J. 4, 17, 2.)

On the other hand, the defeated possessor had claims upon the *petitor*.

If a man buys a farm in good faith from one that is not the owner, believing him to be the owner, or receives it from him in like good faith as a gift, or on some other lawful ground, it is decided by natural reason that the fruits he has reaped shall be his in return for his tillage and care. And, therefore, if the true owner afterwards comes forward and claims the farm, he can bring no action for the fruits the possessor has consumed. But if the possessor knew the farm to be another's, no such favour is granted him. And so he is forced to restore not only the farm, but the fruits as well, even though they have been consumed. (J. 2, 1, 35.)

As might be expected, least indulgence was shown to a *mala fide possessor*. He could demand a set-off only for necessary expenses (*impensae necessariae*) ; as regards *utiles impensae*, he could carry off only what might be taken away without leaving the property worse than he found it. (C. 3, 32, 5.) The *bona fide possessor* cannot sue the *petitor* for even necessary expenditure, but he can resist ejectment until his claim is met. (D. 6, 1, 48.) If the possessor has had to pay damages for a wrong done by the slave whom he must restore, he must have the amount repaid him. When he has built on the land from which he is to be ejected, the *petitor* had the option of allowing him to remove the building instead of giving compensation. (D. 6, 1, 27, 5 ; C. 3, 32, 16.)

A has imprudently bought land belonging to B, and has built upon it or sown it, A is evicted at the suit of B. What ought to be done with the improvements ? If B would have done the same thing if in possession, he ought to pay to the extent to which A has improved the land. If, however, B is poor, and would be deprived of his ancestral property if he had to pay A out in full, then A shall have power to carry away only in so far as he does not injure the land ; and even B may in certain cases be allowed to retain the things for what it would be worth to A to carry them off. If,

again, B were trying to recover the property to sell it, he must pay the full value of the improvements. (D. 6, 1, 38.)

6. Costs.

By the XII Tables,¹ if the possessor failed, he must pay double the produce. This lasted up to A.D. 309; and we learn from a constitution of Valentinian and Valens (C. Th. 4, 18, 1), that the possessor had to pay double *fructus*, in addition to the regular costs of suit, if he were evicted by the judgment. This constitution is not contained in the Code of Justinian, and we may, therefore, take it that in his time the double penalty had fallen into disuse.

In the *actio finium regundorum* the *judex* ought to look narrowly whether any award is needful. • In one case, certainly, it is needful, if it is more convenient that the fields be marked out by clearer bounds than they have been marked with of old. Then some part of one man's land must be awarded to the owner of the other land; and in this case it follows that the latter ought to be condemned to pay to the former a fixed sum of money. And there is another ground for condemning a man in this proceeding; namely, if, as may happen, he has wilfully done some wrongful act in regard to the bounds—stolen the boundary-stones, for instance, or cut down the boundary-trees. And obstinate contempt of court (*contumacia*) too is a ground of condemnation in this proceeding, as when the *judex* orders the lands to be measured, and the owner does not allow this to be done. (J. 4, 17, 6.)

JOINT-OWNERSHIP (*CONDOMINIUM*).

DEFINITION.

Joint-ownership exists when more than one person has an interest as owner in any undivided thing. The owners are entitled in common to the produce of the property, and must in common defray the necessary expenses.

And again, if something belongs to several persons (not partners) in common; if it has been, for instance, bequeathed or given to them equally; and if one of them is liable to a proceeding *communi dividundo* on the part of the other, because he alone has enjoyed the fruits of that thing, or because his fellow-owner has alone spent what was needful upon it, then he cannot be said to be subject to an *obligatio ex contractu*, for no contract was made between them; and because he is not liable *ex maleficio*, he is liable *quasi ex contractu*. (J. 3, 27, 3.)

RIGHTS AND DUTIES.

A. Rights of Co-owners.

1. The co-owners are entitled to the produce according to their share. (D. 10, 2, 56.) The mode of enjoying the produce may be determined by agreement between the parties, thus—

¹ (*Si vindictiam falsam tulit, si velit is . . . tor arbitros tris dato, eorum arbitrio . . . fructus duplione damnum decedito.*)

that each shall have the fruits in alternate years. (D. 10, 3, 23.)

2. Each owner is entitled to alienate his undivided share (C. 3, 37, 2); and, upon his death, it descends to his heirs. (D. 10, 3, 4, 3.)

B. Duties of Co-owners.

1. It is the duty of the joint-owners to defray their share of the expense incurred by any one of them on behalf of the joint-property, and also to exonerate a joint-owner from any liability he has incurred. (D. 10, 3, 4, 3; D. 10, 3, 15.) This includes all expenditure from the date that the property was held in common (D. 10, 3, 4, 3), up to the time that judgment is given in a suit for partition. (D. 10, 3, 6, 3.)

Illustrations.

One of two joint-owners (brothers), without any necessity, for his better accommodation, adds a new wing to the family mansion. This comes under the head of ornamental expenditure (*voluptariae impensae*), and cannot be recovered. (D. 3, 5, 27.)

A and B are co-owners of a slave. A releases the slave from pawn. The slave dies. A can require B to share the expense of releasing the slave. (D. 10, 2, 31.)

A and B are co-owners of a slave; and A, being sued in an *actio de perulio*, is compelled to pay a debt contracted by the slave. B must pay his share of that sum. (D. 10, 3, 8, 4.)

A and B are co-owners of a farm: A thinks that C is his co-owner. A spends money on the farm for necessary and beneficial purposes. Can he sue B to compel him to pay his share? Yes, because he acted as a partner, although he was mistaken in the person. (D. 10, 3, 6; D. 10, 3, 29.) But if A did not know that B was a partner, and thought himself sole owner, he could not afterwards sue B; but he could, as a *bona fide possessor*, resist eviction until he had received compensation for his outlay. (D. 10, 3, 14, 1; D. 10, 3, 6, 2.)

2. Each co-owner must share in the loss caused by a slave or animal held in common. If a slave held in common steals from one of the owners, or injures his separate property, the other owners must share in the loss, or surrender their share in the slave. If the co-owners have sold their share the purchaser is responsible, because the remedy follows the slave (*actio noxalis caput sequitur*); and so, if the slave is dead, there is no redress at all. (D. 47, 2, 61.)

3. Each co-owner is bound to take the same care of the common property that he does of his own, and must make good all loss sustained by his default to the co-owners in proportion to their shares. (D. 10, 3, 8, 2; D. 10, 2, 25, 16; D. 10, 3, 20.) A co-owner is not responsible, however, for more than the actual loss sustained; he is not subjected to any penalty, as under the

Aquilian law. (D. 10, 2, 17.) In like manner, the heir of an owner is liable for all damage done by his ancestor, although he would not be responsible under the Aquilian Law. (D. 10, 3, 10.) The reason is that he is not subject to penal damages, but only to such as equity requires.

INVESTITIVE FACTS.—1. By agreement between two or more persons forming a partnership (*societas*); in this case actual delivery of the property is not necessary.

2. By legacy of a thing to two or more persons, or by gift or other mode independent of the agreement of the co-owners. (D. 10, 3, 2.)

It was unnecessary that the parties should obtain the property at the same time, or in the same right. Thus, when a partner sells his share, the buyer becomes a co-owner with the former partner; and so when a co-owner dies, and is succeeded by his heir. (C. 3, 37, 2; D. 10, 2, 48.)

DIVESTITIVE FACTS.—1. Release. If a co-owner agrees to refrain from demanding his share, the joint-ownership is at an end. (D. 10, 3, 14, 4.)

2. Voluntary division. If the co-owners are not minors, they may*divide the property, in the usual mode, by delivery of possession. (C. 3, 38, 8.) Writing was not required. (C. 3, 36, 12; C. 3, 37, 4.) A voluntary division might take place, even after an application for a judicial partition. (D. 10, 2, 57.)

3. Judicial partition. Any co-owner had a right to a judicial partition. (D. 10, 3, 29, 1; D. 10, 3, 8; C. 3, 37, 5.) An agreement that the property should not be divided for a certain time delayed the application, but an agreement that the property should remain for ever undivided was void. (D. 10, 3, 14, 2.) The judge had perfect freedom in the mode of division, but was bound to make such a division as the co-owners desired, or was most expedient for all. (D. 10, 3, 21; C. 3, 37, 1.)

The steps are the same if the *actio communi dividundo* is brought in regard to more things than one. For if it is brought in regard to some one thing—a field, for instance—if that field can be conveniently divided, a part ought to be adjudged to each; and if one man's part seems unfairly large, he ought to be condemned in turn to pay a fixed sum of money to the other. But if it cannot be easily divided—if it is a slave, perhaps, or a mule, that is the object of the action—then it must be adjudged entire to one, and he must be condemned to pay the other a fixed sum of money. (J. 4, 17, 5.)

The judge could give the land to one, and a usufruct of it to

the other (D. 10, 2, 16, 1; Frag. Vat. 47); also, he could impose a servitude upon one portion of the divided land in favour of another. (D. 10, 2, 22, 3; D. 10, 3, 18.)

And in those proceedings whatever is adjudged to any one becomes at once the property of him to whom it is adjudged. (J. 4, 17, 7.)

But the parties must guarantee each other against eviction (D. 10, 3, 10, 2); they were in fact regarded as reciprocally vendors and purchasers, each a purchaser of his own share, and a vendor of all the other shares. (C. 3, 16, 14; C. 3, 38, 1.)

REMEDY. *Actio communi dividundo*.

This action might be brought, during the continuance of the joint-ownership, to enforce the duties of the co-owners, as well as to obtain a judicial partition. (D. 10, 3, 14, 1; D. 10, 3, 23; D. 10, 3, 6, 1; D. 10, 3, 11.) It is thus at the same time a remedy for the rights and duties, and for the Investitive Facts.

1. The plaintiff and defendant are not distinguished in this suit very easily, as all have the same interest. In one sense all parties are at once plaintiffs (*actores*) and defendants (*rei*) (D. 10, 2, 2, 3); but in a special sense, the person that demands the judicial partition may be called plaintiff (*actor*). (D. 10, 3, 2, 1.)

2. The action may be brought more than once, so long as any of the joint-property is undivided. (D. 10, 3, 4, 2.)

Some *actiones* seem to be mixed in character, being at once *in rem* and *in personam*. Such are the *actio familiae erciscundae*, open to co-heirs for the division of the inheritance; *communi dividundo*, given as between those that for any reason have come to be joint-owners, and wish the property to be divided; and *finium regundorum*, an action between owners of adjoining lands. In all three proceedings the judge is allowed to adjudge the property to one of the parties in the action on fair and equal grounds; and if one man's part seems too large, to condemn him to pay in turn to the other a fixed sum of money. (J. 4, 6, 20.)

A P P E N D I X.

POSSESSION.

Possession (*possessio*) has its special remedies (*Interdicta*), just as ownership (*dominium*) is protected by actions (*actiones*). To understand possession, therefore, it is indispensable to know something of Interdicts. In addition to what is stated on the subject of Interdicts at the proper place (see Book IV., Proceedings *in Jure*, Interdicts), it may help the reader to add here the observations made by Gaius and Justinian with regard to the general characteristics and functions of the Interdict. Only

a portion of what follows refers to the subject of possession ; but all the passages are useful as throwing light on the place that the possessory Interdicts hold in the wider class of Interdicts.

The chief division of interdicts is this : they are either of prohibition (*prohibitoria*), for restitution (*restitutoria*), or for production (*exhibitoria*). In interdicts of prohibition the Praetor forbids something to be done ; as when he forbids force to be used to a possessor untainted by bad faith, or to a man that is burying the dead where he has a right to bury ; or when he forbids building in a sacred spot ; or when he hinders anything from being done on a stream open to the public, or on its banks, to injure the navigation. In interdicts for restitution, again, he orders something to be restored ;—to the *bonorum possessor*, for instance, the possession of goods that form part of the inheritance, and are now possessed by some one as heir or as possessor ; or possession to him that has been driven out of possession of his land by force. And, lastly, in interdicts for production he orders something to be produced ;—the slave, for instance, whose freedom is in dispute, the freedman to whose services the *patronus* would lay formal claim, or the children *in potestate* to the parent. There are, however, some that think the term interdict can be properly applied only to the interdicts of prohibition, because *interdicere* means to warn formally, to prohibit ; and that the proper term for interdicts for restitution and production is decrees. But the prevailing usage is to call all interdicts, because they are declared as between two parties (*inter duos dicuntur*). (J. 4, 15, 1 ; G. 4, 140, 142).

The next division of interdicts is this : some are the means of gaining, some of retaining, and some of recovering possession. (J. 4, 15, 2 ; G. 4, 143.)

To gain possession, an interdict called after its first words, *Quorum bonorum*, is granted to the *bonorum possessor*. Its force and effect are this : When *bonorum possessio* has been given to a man, then this interdict binds any actual possessor (whether as heir or as possessor) of goods so given to restore them to the *bonorum possessor*. A man possesses as heir when he believes himself to be the heir. He possesses as possessor when with no right at all he is in possession of property belonging to the inheritance, or even of the whole inheritance, though he knows it does not belong to him. This interdict is called for gaining possession (*adipiscendae possessionis*), because it is of use to him only that now for the first time tries to gain possession of property. If, therefore, a man gains possession and then loses it, this interdict is of no use to him. (J. 4, 15, 3 ; G. 4, 144.)

There is an interdict, too, called *Salvianum*, that is a means of gaining possession. It is used by a landlord to gain possession of a tenant-farmer's effects when expressly pledged for the rent. (J. 4, 15, 3 ; G. 4, 147.)

The *bonorum emptor*, too, has in like manner an interdict open to him. Some call it the interdict for possession (*possessorium*). (G. 4, 145.)

The interdicts that are the means of retaining possession are *Uti possidetis* and *Utrubi*. These are granted when two parties are at variance in regard to the ownership of some property ; and the prior question is raised, which of the two is to go to law as possessor, and which as claimant? (J. 4, 15, 4 ; G. 4, 148.)

If lands and houses are at stake, the interdict *Uti possidetis* is employed ; if the possession of moveables, the interdict *Utrubi*.¹ (J. 4, 15, 4A ; G. 4, 149.)

Now the force and effect of these two interdicts was among the ancients widely different. In the case of the interdict *Uti possidetis*, he that was in possession at the time of the interdict prevailed, if only he had not obtained possession from his opponent by force, by stealth, or by leave. A third party, however, he might have driven out by force, or from him he might have stealthily snatched the possession, or he might have begged leave to become possessor. But in the case of the interdict *Utrubi*, he that was in possession during the greater part of that year prevailed, if only he was in possession as against his opponent neither by force, nor by stealth, nor by leave. [And this is sufficiently shown by the very words of the interdicts.] (J. 4, 15, 4A ; G. 4, 150.)

Now under the interdict *Utrubi*, a man profits not only by his own possession, but by another's, if fairly reckoned as accessory ; by the former possession, for instance, of a man whose heir he is, or from whom he has bought the thing, or received it as a gift or by way of dowry. If, therefore, the lawful possession of another, when joined to our possession, overtops the opponent's possession, then under that interdict we prevail. But if a man has no possession of his own, no time beyond is given or can be given as accessory thereto. For to what is itself nothing there can be no accession. If, then, a man's possession is tainted—that is, acquired from his opponent by force, by stealth, or by leave—no accession is given. For his own possession profits him nothing. (G. 4, 151.)

The year, too, is reckoned backwards. And so, if you, for instance, were in possession for the first five months of the year, and I for the seven later months, I shall be preferred because my possession exceeds yours in the number of months. And it profits you nothing in regard to this interdict that your possession in that year was earlier. (G. 4, 152.)

At the present day, however, the usage is different. For the effect of both interdicts, as far as regards possession, has been made just the same. So then, whether the object in dispute is landed property or a moveable, he prevails that at the time of the law-suit holds the property in his possession, if only he has not got possession from his opponent by force, by stealth, or by leave. (J. 4, 15, 4A.)

¹ The formula of *Uti possidetis* given by Festus is : “ *Uti nunc possidetis eum fundum, quo de agitur, quod nec vi nec clam nec precario alter ab altero possidetis, ita possideatis, adversus ea vim fieri veto.*”

In the Digest it is given thus :—*Praetor ait* : “ *Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto.*

“ *De cloacis hoc interdicitum non dabo.*

“ *Neque pluris quam quanti res erit ; intra annum, quo primum experiundi potestas fuerit, agere permittam.*” (D. 43, 17, 1, pr.)

The interdict *Utrubi* is mentioned in D. 43, 81, 1, pr. *Praetor ait* : “ *Utrubi hic homo, quo de agitur, majore parte hujusce anni fuit, quo minus is eum ducat, vim fieri veto.*”

Possession is held to include not merely personal possession, but possession by another in our name ; and this even though that other is not subject to our power, as when he is a tenant or a lodger. We may possess, too, by means of others with whom we have deposited anything, or to whom we have lent it. This is the meaning of the common saying, that we can keep possession by means of any one that is in possession in our name. Moreover, it is decided that possession may be kept by intention as well : that is, that although we are not in possession, either personally or by means of others acting in our name, yet if we had no intention to abandon possession, but went away with a view to returning, we still keep possession. Possession may be gained, too, by means of others, as we have set forth in the Second Book. But there is no doubt that it cannot be gained by a bare intention only. (J. 4, 15, 5 ; G. 4, 153.)

The third division of interdicts is this :—They are either simple or double. They are simple when one party is plaintiff and the other defendant, as in all interdicts for restitution or production. For the plaintiff is he that desires restitution or production ; the defendant is he from whom such restitution or production is desired. Of interdicts of prohibition, again, some are simple, others double. When, for instance, the Praetor forbids anything to be done in a sacred place, or on a public river or its bank, the interdicts are simple : for the plaintiff is he that desires that nothing be done, the defendant he that tries to do it. Of double interdicts, again, *Uti possidetis* and *Utrubi* are examples. They are called double because both parties to the suit stand on the same footing, neither being specially defendant or plaintiff, but each sustaining both parts alike. (J. 4, 15, 7 ; G. 4, 156-160.)

OUTLINE.—The notion of Adverse Possession is not confined to Roman Law. In the time of Justinian, and apparently also of Gaius (G. 4, 148), the notion of adverse possession seems to exhaust the whole meaning of the doctrine of possession. The adverse possessor had the protection of interdicts. Distinction between *bona fides* and *mala fides*.

Many reasons concur to show that it is in the very highest degree improbable that interdicts were introduced for the sake of the adverse possessor. If they had been introduced for the sake of the *bona fide* possessor, they would have been restricted to that case. Certain interdicts also were used by owners, but they could not have been introduced in the first instance for owners, otherwise possessors that were not owners would not have got the benefit of them.

Possessory interdicts were introduced for the sake of those that could not enjoy Quiritarian ownership, but to whom it was desired to give substantial or beneficial ownership. This may be called Equitable or Praetorian ownership. It occurred in one case—that of aliens (*peregrini*), and possibly in another (*ager publicus*).

The Praetor took delivery of possession as the investitive fact in the equitable ownership he created in favour of aliens. There were reasons why *bona fides* was irrelevant to this investitive fact.

The possessory interdicts once introduced were allowed to owners (*domini ex jure Quiritium*), *bona fide* possessors, and *mala fide* possessors, on the simple ground that they were possessors.

The defects of the Roman Law of property, that had made the introduction of equitable ownership a necessity, disappeared at an early period, possibly before Cicero, certainly after the reign of Caracalla. Henceforth the possessory interdicts were used by two classes only—(1) owners, and (2) adverse possessors.

The arguments for this view of the history of possession are set forth in the following statement:—

ADVERSE POSSESSION IN THE ROMAN LAW.—A broad distinction was drawn by the Roman jurists between possession and ownership. Ulpian says the interdict *uti possidetis* was introduced because there ought to be a distinction; for it may happen, as he says, that a possessor may not be owner, or an owner may not be possessor, or that the owner may be possessor. (D. 43, 17, 1, 2.) At the first glance this seems to correspond with the famous distinction between *de jure* and *de facto*. A rightful king driven from his throne was called by his supporters the king *de jure*, while his usurping opponent was recognised as only king *de facto*. As applied to ownership, the distinction taken by Ulpian may be expressed thus:—A possessor that is not at the same time owner, is a person that exercises the rights of ownership, although not invested with ownership by any investitive or transvestitive fact (for the sake of brevity, say simply any investitive fact). An owner that is not at the same time a possessor, is a person invested with ownership by some investitive fact, although he does not exercise any of the rights of ownership. In short, there is a separation between two things that, in contemplation of law, must go together—the right and its investitive fact. The person invested does not exercise his rights, and the person exercising the rights is not invested with the ownership. So expressed, the idea of possession is perfectly simple. Whether the person (not invested), but still exercising the rights of ownership, thinks or does not think himself owner, is at present beside the question. He is a possessor, and not an owner, if there really be (whatever he may think) no investitive fact in his favour.

What attitude ought the law to adopt towards a mere possessor? The answer to this must differ according as we consider the relation of the possessor to the owner, and to persons other than the owner. Manifestly as against the owner a possessor can have no right to the thing in his possession. The law specifies certain investitive facts as the condition of ownership. If then it were to treat as owner a person that had not acquired the ownership by any investitive fact, and to refuse to regard as owner the person that had acquired ownership by an investitive fact, it would stultify itself. But as against a person that is not owner, a possessor stands in a very different

position. If A enters on land possessed by B, and neither A nor B asserts that the land belongs to him by any investitive fact, there is nothing unreasonable in saying that B should be protected in his possession against A. To use the expression of Paul, as between A and B, B has the better right to the possession. In a controversy between them, it is immaterial that B does not claim to have any right of property founded on any investitive fact; for A is in the same position.¹

How far did the Roman Law proceed in accordance with those general ideas? The case of the *bona fide* possessor may be dismissed at once. We have seen that he could maintain an action for theft not merely against men generally, but even against the owner. (G. 3, 200; J. 4, 2, 1.) For many purposes a possessor who believed himself to have a good title, although he had not, was entitled to great indulgence. But the question is, how far did the law extend protection to a *mala fide* possessor—(in other words), to one that had not, and knew that he had not, any title?

In answering this question, a distinction must be made between moveables and immoveables.

(1.) The *mala fide* possessor of moveables, or, to employ an equivalent and more vigorous expression, a robber or thief, had no right against third persons, much less against the owner. A *bona fide* possessor could bring the *actio vi bonorum raptorum* (J. 4, 2, 2), but not a thief. (D. 47, 2, 12, 1.) What makes this the more striking is, that even when a thief could acquire by *usucapio* (as in the old case *pro herede*), he could not sue one that by theft deprived him of possession. (D. 47, 2, 71, 1.)

(2.) A *mala fide* possessor of land, on the other hand, as against third parties, was absolutely entitled to retain possession. No one could turn out a possessor against his will. Although, under the old law, a *mala fide* possessor might be ejected by the owner by force without arms, yet after the enactment of Valentinian even the owner could no longer use force against a *mala fide* possessor (p. 105).

POSSESSIO AS EQUITABLE OWNERSHIP.—If the case ended here, the subject of possession would present very little difficulty. Possession would imply a temporary disturbance

¹ *Qualicumque enim possessor, hoc ipso, quod possessor est, plus juris habet, quam ille qui non possidet.* (D. 43, 17, 2.)

of the normal legal state; a separation between a person enjoying the right, and the person invested by law with the right. This divorce is put an end to when the person invested with the rights takes the proper legal steps to enforce them. But in the Roman Law possession is regarded not merely as a provisional state protected by law from interruption by violence, but as a kind of ownership, distinct from *dominium*, but parallel to it. The passages quoted from Gaius (G. 4, 156-160) afford, when taken in conjunction with the characteristics of the old *actio sacramenti* (see Book IV., *Proceedings in Jure, Legis Actiones*), the most convincing evidence of this parallelism. It is a characteristic of the old *vindicatio* that in the beginning of the process there was neither plaintiff nor defendant. The action simulated a quarrel between two persons, with an appeal to the Praetor. The first thing the Praetor did was to command the parties to desist from the strife; the next was to see whether there was any real issue between them: if there was, he prepared a *formula* to put before a *judex*, and in the meanwhile decided who should have the *interim* possession. The person that got *interim* possession was defendant, and the other was plaintiff. In point of fact, there was in this, as in other cases, a plaintiff from the beginning; but according to the form of proceeding, the law knew neither plaintiff nor defendant until a certain stage in the action was reached. This ancient, but highly artificial, procedure was imitated in the case of the interdicts by two only, *uti possidetis* and *utrubi*. Although the interdict *uti possidetis* could not be brought except by an actual possessor, and the object of the interdict was to prevent the possession being challenged, yet at the beginning of the proceedings the Praetor refused to recognise either party as in possession, and proceeded to determine the question of intermediate possession in a manner at once clumsy and inconvenient, but adhering with pedantic fidelity to the model of the old *vindicatio*. What is the inference suggested by this strange parallelism? May we not say that possession has become ownership—not indeed *dominium*, with its appropriate action of *vindicatio*, but a new kind of ownership, asserted by interdicts? Thus in *dominium* we have rights vindicated by certain special actions, and investitive facts enforced by different actions. So in possession (of land) the rights of the possessor are protected by the interdicts *de vi* and *quod vi aut clam*, as in the case of *dominium*; and, moreover, there

are special investitive facts with their appropriate remedies—the interdicts *uti possidetis* and *utrubi*. In the interdict *uti possidetis*, for example, the question to be determined is precisely analogous to that in *vindicatio*. In *vindicatio* the question is whether there are any investitive facts in favour of the claimant; if there are, he is declared owner. In *uti possidetis*, in like manner, the question is whether there is an investitive fact of possession, and the claimant, if successful, gets possession. As the Praetor was the great fountain of equity in the Roman Law, and as all interdicts were special emanations of his magisterial authority (*imperium*), we may, without impropriety, call the possession protected by the interdict—EQUITABLE OWNERSHIP.¹

Before considering the evidence in favour of this mode of representing the relation of Possession to Ownership, it is necessary to define more closely the terms employed. The word "*possessio*" is itself used in two different senses. It designates both the investitive fact and the rights created by that fact. In speaking of ownership we have two terms—*dominium*, signifying the totality of rights; and, say, *traditio*, the name of the investitive fact. But unfortunately the word *possessio* is used indifferently for the investitive fact—namely, obtaining physical control over a thing—and for the right to enjoy the undisturbed possession of the thing, which is the legal effect of obtaining physical control. It would not be easy to exaggerate the mischief arising from this ambiguity. Possession—is it a Fact or a Right?—is a question that has been discussed almost interminably. Some authors say it is a fact, which is true; others say it is a right, which is also true; and others say it is both a fact and a right; meaning neither, but a confused jumble of both.

In one instance only do the Roman Jurists expressly say that possession was equitable ownership; and the language they employ is worthy of notice. When a *res mancipi* was delivered to a person without *mancipatio*, there was by the civil law no conveyance; the owner still remained owner (*dominus ex jure Quiritium*); but he was not allowed to exercise

¹ "*Possessio*" may be regarded as equitable ownership, in the sense of being a creation of the Praetor, and having no recognition from the *jus civile*; but it did not depend upon *dominium* in the same way as an English equitable estate requires to be supported by a legal estate. Although the Roman Praetor and the English Chancellor were guided by a similar spirit in establishing equitable interests, there are considerable differences in the results of their activity, owing to the very different circumstances with which they had to deal.

any of the rights of ownership, and the possessor was said to have the thing *in bonis*.¹ It would be a perfectly fair translation of *bona fide possessio* (after the introduction of the *Actio Publiciana*) to call it Praetorian or Equitable ownership. The separation between the equitable and legal ownership continued until the time of *usucapio* had run, and the possessor became *dominus ex jure Quiritium*. The separation of the two kinds of ownership was temporary.

The Roman Law affords us, however, instances where the equitable estate (*in bonis*) was not transient, but permanent. For example, land situated out of Italy could not be acquired by *usucapio*, but it was an object of commerce, of sale and exchange, and a *bona fide* possessor was protected by the *Actio Publiciana*. (D. 6, 2, 12, 2.) Such a possessor had only an equitable estate, and never had anything more, until, upon the changes made by Justinian, possession for a long time was held to give legal ownership (*dominium*) (p. 144). In this case the equitable estate was permanent, because in land out of Italy legal ownership was impossible. Practically, such possession was ownership; nominally, it was not. The Praetor gave the possessor nearly every right that a legal owner (*dominus ex jure Quiritium*) could exercise; but he could not give him that ancient title.

ANALOGY OF EQUITABLE OWNERSHIP.—Passing for a moment to a different department of law, we meet a phenomenon of the same notable character. In the law of inheritance the Praetor played a conspicuous part. He interfered with the established rules of succession; he cast down, and he raised up. The manner and objects of his intervention are alike deserving of attention. The rules of succession contained in the XII Tables were adapted to a social

¹ A *bona fide* possessor, although he could not have ownership, could have goods; and this language may be compared with the phrase applied to the interest of an heir whose title was derived from the Praetorian edict, not from the civil law; namely, the possession of goods (*bonorum possessio*). The word "property" in English means either the aggregate of rights of an owner, or the thing that is owned, as when we speak of a man of large property. "*Dominium*" is employed to express the aggregate of rights, and is the equivalent of "ownership;" the objects of ownership were designated either specifically, as land, houses, &c., or simply as things (*res*). "*Bona*" was the equivalent of property in the second sense, meaning not the rights of the owner, but the things belonging to him; and therefore another phrase is wanted to give the corresponding term of "ownership;" that phrase is *possessio bonorum*.

system of which the unit was the *paterfamilias*, where every one either was subject to, or exercised, the *potestas*. But as the patriarchal age receded, and Rome came nearer the climax of her greatness as the lawgiver and mistress of the world, the *potestas* withered, and the personal independence of the individual became the basis of the social organisation. As time went on, the old law of inheritance became less and less in harmony with the progressive march of Roman civilisation, and the rules of succession often caused the cruellest injustice. Under the Empire, the improvement of the law was effected by direct legislation; but during the Republic the adjustment of the law to the changing moral sentiments of Roman society was almost exclusively effected by the less obtrusive agency of the Praetor. In the exercise of his supreme power (*imperium*), the Praetor called persons to the succession of a dead man in a very different order from that presented by the XII Tables. But the persons that he introduced did not get the inheritance (*hereditas*); for the saying was that the Praetor could not make an heir (*heres*). While religiously observing this rule, the Praetor gave, under the name of *bonorum possessio*, every right that a *heres* enjoyed. Hence there grew up by the side of the old a new law of inheritance, with a new name; and for many centuries the distinction between a legal and equitable heir (*heres* and *bonorum possessor*) continued to perplex and complicate a portion of the law that at the best was not very simple. In the end, the distinction ceased to have any practical importance; the legal was merged in the equitable inheritance. The *bonorum possessio* imparted to the *hereditas* its characteristic flexibility and liberality; while the inconveniences that always and almost necessarily attach to every form of equitable estate were removed by conferring the legal estate on the equitable heir.

DEFECTS OF THE EARLY ROMAN LAW OF PROPERTY.—The early Roman law of property is characterised by precisely the same kind of defects that led to the interference of the Praetor in the law of Procedure, Contract, and Inheritance:—(1.) The modes of conveyance (*mancipatio*, *cessio in jure*) were formal and inconvenient; (2.) The *ager publicus* (the old common land of the Roman people), although inclosed and cultivated, could not be held in ownership (*dominium ex jure Quiritium*); and (3.) Aliens could not be owners. The *mancipatio*

existed in the time of Gaius, but fell into disuse before Justinian ; and the *ager publicus*, so far back as legal records go, could always be held in *Quiritarian* ownership. After Caracalla, the disabilities of aliens were no longer of importance, because every subject of the Roman Emperor was a citizen. But could an alien not be owner before that time ? There is conclusive proof that an alien could be owner of property long before Caracalla. Now these three evils—the inconveniences of the *mancipatio*, the disability of citizens to own portions of the *ager publicus*, and of aliens to hold any property whatever—were all remedied by the Praetor.

I. The manner in which the Praetor dealt with the inconveniences and dangers of the formal conveyances has already been described. But one question remains to be answered. The *actio Publiciana* was introduced at a late period : what remedy then had the *bona fide possessor* before that time ? Unquestionably he had the possessory interdicts. But it would be rash to affirm that it was for this case that these interdicts were first brought in. A person whose title was defective only from an informal conveyance was a *bona fide possessor* ; but the interdicts were open equally to *mala fide* possessors. It has been already said that the Praetor never interfered except when necessary ; it is equally true that he never interfered further than was necessary. If the Praetor had brought in an interdict for the sake of the *bona fide possessor*, it may be affirmed with some confidence that he would not have introduced a remedy equally open to the thief and the robber.

II. If the theory of Niebuhr and Savigny as to the character and history of the *ager publicus* be correct—that portions of the *ager publicus* were inclosed by patricians, and given to their clients to be cultivated as tenants-at-will, without rent—all the conditions are present for the creation of equitable interests. No one could be *Quiritarian* owner of any portion of the *ager publicus* ; and therefore the interests of the patricians and their clients, the cultivators, could have no other support than the Praetor. If any ownership was recognised at all, it must be Equitable, because it could not be *Quiritarian*. The character of *precarium* (see Quasi-Possession) affords some grounds for believing that in Rome certain land was given to tenants-at-will that could not be recovered by *vindicatio*, and therefore could not have been held in *Quiritarian* ownership. This would coincide with the peculiarity of the *ager publicus*.

If the origin of the interdict *uti possidetis* may be assigned to

the relation of patricians and their clients to the *ager publicus*, one of the most remarkable characteristics of possessory interdicts would be accounted for—namely, that *bona fides* was not required. *Bona fides*, as related to possession, had a peculiar technical meaning. It did not signify mere honesty; it meant that the possessor had got the thing in a way that justified him in believing himself to be owner. But a possessor of *ager publicus* knew that he could not be owner; and he also knew that nobody else could be owner; and therefore, although he was not a *bona fide* possessor, so neither could he be called a *mala fide* possessor in any other than a purely technical sense. In truth, the legal notion of *bona fides* is entirely irrelevant to the case in question. Now the Praetor looked solely to the fact of possession, and treated *bona fides* as a simple irrelevance.

The theory of Savigny, if it were fully established by independent evidence, would afford a satisfactory explanation of the interdict *uti possidetis*; but it can hardly be said to rest on an unassailable basis, and it does not account for the interdict *utrubi*, which applies to moveables only.

III. There is, however, another case, strangely overlooked by Savigny and other learned writers, quite capable of accounting for the peculiarities of the whole Praetorian law of possession. It was only by means of a doctrine of equitable ownership that aliens (*peregrini*) could enjoy rights of property. An alien could not be a Quiritarian owner; he could not take part in the *mancipatio*, *cessio in jure*, or acquire by *usucapio*. He found no place in the Roman Law as it stood prior to the intervention of the Praetors. But an alien, although he could not be an owner, could be a possessor; and it was competent to the Praetor to throw around such possession the shield of his *imperium*. The Praetor did not exact *bona fides*, for the simple reason that the alien knew that he could not possibly acquire a legal title.

But was there any necessity for admitting aliens to the enjoyment of civil rights? We may infer that there was from the fact that the steady policy of the Praetors through centuries was to extend the law to aliens. The circumstance that the additional Praetor created in B.C. 246 was called *Praetor Peregrinus*, proves that already at that time the legal business of aliens was sufficiently great to give occupation to a special magistrate; and considering that the work of the magistrate consisted merely in

ascertaining the question in dispute between litigants, and naming an arbitrator to decide on the merits, this fact alone speaks volumes as to the position of aliens in Rome. But it does not rest upon inference merely. In the first place, we know that at a very early period the law of contract was expanded to admit aliens. The formal words of the *stipulatio* were modified for the express benefit of aliens; and aliens could enter into contracts that arose *ex jure gentium*, a class that included every contract of any importance in the Roman Law, except the *stipulatio*. (D. 48, 19, 16.) But nine contracts out of ten have no other object than the acquisition of property. Consequently, if the law of contract was opened to aliens, so also must have been the law of property. This argument is perfectly irresistible; but the conclusion does not rest upon argument. Gaius has furnished us with explicit testimony both as to the fact that aliens were admitted to proprietary rights, and also as to the manner in which it was done in the case of moveables.¹

And again, an alien is by a fiction regarded as a Roman citizen, when he is plaintiff or defendant on some ground for which an action is established by our Statutes; provided only it is just that such an action should be extended even to an alien. If, for instance, it is alleged that an alien has aided or been privy to a theft, and an action is brought against him, the formula is framed thus:—"Let there be a *judex*. If it appears that Dio, a Greek, aided or was privy to the theft of a golden platter from Lucius Titius, and ought, on that account, if he were a Roman citizen, to be cast in damages as a thief;" and so on. Again, if an alien brings an action for theft, he is by a fiction regarded as a Roman citizen. In like manner, also, if under the *lex Aquilia* an alien bring an action for *damnum injuria*, or if such an action is brought against him, then by the fiction that he is a Roman citizen a remedy is given. (G. 4, 37.)

By the aid of a fiction, an alien was enabled to sue a thief or any person injuring his property. Suppose, however, a person claimed a slave in the possession of an alien, and took him away by force, what was the remedy of the alien? Not the *actio vi bonorum raptorum*, because the claimant was not a robber;

¹ *Item ciuitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit, eam actionem etiam ad peregrinum extendi, uelut si furtum dicatur (factum ope consilio) 'peregrini et cum eo agatur, formula ita concipitur: IVDEx ESTO. SI PARET, 'OPE CONSILIO DIONIS' GRAECI (Lucio) TITIO FVRTVM FACTVM ESSE PATERAE AVREAE, QUAM OB REM EVM, SI CIVIS ROMANVS ESSET, PRO FVRE DAMNVM DECIDERE OPORTERET et reliqua; item si peregrinus furti agat, ciuitas ei Romana fingitur. similiter si ex lege Aquilia peregrinus damni iniuriæ agat aut cum eo agatur, ficta ciuitate Romana iudicium datur.*

there was then only the interdict *utrubi*. Again, if between a citizen and an alien, or between two aliens, a dispute arose as to the ownership of a slave, there was no other means of settling the dispute than the interdict *utrubi*. In like manner, an alien could enjoy and maintain an interest in immoveables only by the interdict *uti possidetis*. An alien, therefore, could be possessor, although not Quiritarian owner; and by the aid of fictions and interdicts, enjoy precisely or nearly the same rights as if he were a Roman citizen. An alien had beneficial, but not technical, ownership. A Roman citizen had Quiritarian ownership, acquired by means of a formal transvestitive fact, and maintained by *vindicatio*. An alien had beneficial or equitable ownership, acquired by delivery of possession, and supported in the case of immoveables by the interdict *uti possidetis*, and in the case of moveables by the interdict *utrubi*.

CONNECTION BETWEEN POSSESSION AND EQUITABLE OWNERSHIP.—A consideration of the circumstances shows how the extension of ownership came to be wrapped up with the idea of possession. Suppose the object of dispute was a slave. How is the Praetor to decide between the two aliens claiming him? Neither of them can be Quiritarian owner, and therefore no question can arise as to the existence of *mancipatio* or any other transvestitive fact of the Roman Law. What substitute could the Praetor adopt for *mancipatio*? The best answer to this question is a brief statement of the substitute actually adopted by the Praetor:—(1) The first rule was that if of two claimants one had possession at the time of action brought, and the other never had had possession, the Praetor preferred the possessor. (2) If both the claimants had been in possession at different times (they could not possibly be together, D. 13, 6, 3, 5), then either one succeeded the other in possession, or there was somebody in possession between them. Take the first case, where the claimants had possession immediately in succession, and suppose Titius was first in possession and Gaius after him. Did Gaius obtain possession with the consent of Titius? If he did, the Praetor decided in favour of Gaius; if he did not, the possession was decreed to Titius. (D. 43, 17, 3.) (3) If there was a possessor between Titius and Gaius, the rule was different. The Praetor decided in favour of the man that had the longest possession in the year preceding. The result of this apparently arbitrary rule was to secure practical justice. Thus if Titius

possessed the slave for six months, and Attius had the slave for one month, Titius would recover the slave from Gaius, if he brought the interdict before the end of five months. In effect, therefore, this rule was equivalent to a doctrine of *usucapio*, and gave the possessor several months to look after his property. When, in addition, a rightful possessor was allowed to count the time of a previous possessor (*accessio possessionis*), as stated in the text, he was provided with a measure of security scarcely less perfect than that given to the Quiritarian owner. In the case of land, the remedy of a possessor was much less complete. In the case supposed, the interdict *uti possidetis* did not lie against Gaius, but the interdict *de vi* could be brought against Attius and damages recovered equal to the value of the possession. (D. 41, 2, 53.) In the result, therefore, mere possession could not establish a title, unless by the laches of the person entitled to possession. No one could really be safe as possessor unless he had obtained delivery from a prior possessor, or had entered on land or seized moveables possessed by no one.

Under the name of *Possessio* the Praetor created a complete law of property adapted for aliens. The Equitable or Praetorian ownership generally ran parallel to the Quiritarian ownership; it diverged from the older law only where that law was inconvenient, or repugnant to common sense. The maxim of English equity, that "equity follows the law," might be applied without much error to the Praetorian rules regarding possession; and nothing can give more complete proof of the proposition now contended for—that possession was Equitable or Praetorian ownership—than a careful study of the rules established regarding possession. To bring out the parallelism between the Quiritarian and Praetorian ownership, it will be convenient to pursue the arrangement adopted throughout this Book in the exposition of legal topics.

POSSESSION.

DEFINITION.—Possession (*possessio*) is the occupation of anything with the intention of exercising the rights of ownership in respect of it.¹

Exception.—A mortgagee and a tenant-at-will are possessors,

¹ *Apiscimur possessionem corpore et animo: neque per se animo, aut per se corpore.* (D. 41, 2, 3, 1.) We gain possession with body and mind; but not with the mind by itself, nor with the body by itself.

although they hold without the intention of exercising the rights of ownership. (D. 9, 4, 22, 1.)¹

A thing is said to be occupied (*tenetur*) when it is so held by any one that he can exclude others from it. Thus, a captain occupies his ship, but not the water through which it passes.

Possession may be lawful (*justa*) or unlawful (*injusta, vitiosa*). It is unlawful when it is acquired or held against the will of a possessor. (D. 41, 2, 3, 5.)

A possessor, but not an occupier, is protected by Interdicts.²

Exception.—A tenant-farmer (*colonus*) was an occupier merely, not a possessor, but if evicted from his farm, he could bring the Interdict *quod vi aut clam* in respect of the crop; but not any other Interdict. (D. 43, 26, 20; D. 41, 2, 25, 1; D. 43, 24, 12.)

RIGHTS AND DUTIES. (1) MOVEABLES.—A *bona fide* possessor had the same rights as an owner. (See pp. 91, 96, 101.) A *mala fide* possessor was not entitled to these rights, as has been already pointed out. It is possible, however, that he could avail himself of the enactment made by Valentinian (p. 96). Again, both a *bona fide* and a *mala fide* possessor were liable to the *actio noxalis* for wrongs done by slaves in their possession. (D. 9, 4, 13; D. 9, 4, 11.) (2) IMMOVEABLES.—Every possessor,

¹ *Licet enim juste possideant non tamen opinione domini possident.* For although they are in lawful possession, yet do they not regard themselves as owners while in possession.

² These definitions are put forth as coming near the truth; but they are not in entire harmony with the language of the jurists. The fact is, that the language of the jurists is not consistent with itself.

Savigny has endeavoured to show that the language of the Roman jurists is clear and consistent. According to him, the varying phraseology of the Digest may be reduced to three heads: (1) *Civilis Possessio* is such possession as ripens by prescription into ownership (*Possessio ad Usucapionem*). (2) *Possessio* (simply) is such possession as never passes into ownership, but is protected by Interdicts (*Possessio ad Interdicta*). (3) *Naturalis possessio* or *detentio* is mere occupation unsupported by any interdicts.

But in D. 10, 4, 3, 15, a mortgagee is said to have merely *naturalis possessio*; although a mortgagee was protected by interdicts. So a wife that held property given to her by her husband against the law prohibiting donations, was said to be *naturalis possessor*; but she also was a *possessor ad Interdictum*. (D. 43, 16, 1, 9-10.) Still the common usage undoubtedly is that possession (*possidere*) means such occupation as is protected by Interdicts. If Savigny had put forth his distinctions as those that the Roman jurists ought to have followed, he might have supported himself by very strong arguments; but his mistake is in attributing to them a greater uniformity and precision of language than can be justified by a careful reading of the texts. The Praetor himself undoubtedly used the word *possessio* in more than one meaning. Generally he employed it in connection with Interdicts, but he also used the expression *missio in possessionem*, meaning occupation, and not judicial possession. In the note on Quasi-possession, examples are quoted of a confused and perplexing use of language on this topic.

whether *bona fide* or not, had the same rights to immoveables as an owner.

INVESTITIVE AND TRANSVESTITIVE FACTS.—The rules upon this subject have been stated under Delivery, a transvestitive fact of ownership (pp. 136-8).

The restrictions on the investitive facts of possession are instructive.

I. Restrictions in respect of things. (1.) Things that cannot be the objects of ownership according to the *Jus Gentium* cannot be possessed. Thus land covered by the sea or a public river cannot be possessed. (D. 41, 2, 30, 33.) *Res divini juris*, as a burial-ground, &c., cannot be possessed. (D. 41, 2, 30, 1.) Again, a freeman, although he may be restrained in his liberty and put in chains, cannot be possessed any more than he can be owned. (D. 41, 2, 23, 2.) But the restrictions on ownership peculiar to the *jus civile* do not govern possession. Thus land in the provinces could be possessed although it could not be owned.

II. Restrictions in respect of persons. Slaves (D. 4, 6, 19; D. 41, 2, 23, 1) and persons under *potestas* (D. 50, 17, 93) could not possess for themselves; but whenever they stood in such a relation to anything that, if they were free, they would possess; in that case their master had possession.

Agency was admitted in possession. Thus when A occupied land with the intention that B should have the right of ownership, and B also had that intention, then B and not A was possessor.¹ (D. 41, 2, 9.) Agency was not admitted in the transvestitive facts of the *jus civile*, and it was through the substitution of delivery for *mancipatio* that the more liberal rules of the Praetorian ownership were extended universally to ownership (p. 179).

DIVESTITIVE FACTS.—A possessor, if not himself also occupier, might lose possession by the act or default of the occupier. Two cases have therefore to be considered.

I. Loss of possession by the possessor himself. Inasmuch as possession consisted of both a mental and a physical fact,—the intention to occupy as owner as well as the actual occupation,—possession was lost if either of those essential elements ceased to exist. (D. 41, 2, 44, 2.)

1. Loss of possession by loss of occupation. This, again, may

¹ *Animo utique nostro, corpore vel nostro vel alieno.* (Paul, Sent. 5, 2, 1.)

occur in one or other of two ways:—there may be an adverse occupation, or there may not.

A man possesses a moveable so long as it is in his custody, or he is in a position to renew the custody when he pleases. (D. 41, 2, 3, 13.) Several examples are given under the head of *Occupatio* (pp. 110, 111).

Illustrations.

A boat carrying some blocks of marble is wrecked in a river, and the marble is lost. Possession of them is gone, but not the ownership; and if the marble is recovered, it may be claimed by the owner. (D. 41, 2, 13, pr.) This illustrates the distinction between ownership and possession. The investitive fact of ownership operates once for all; and therefore a person once made an owner, is always an owner until some divestitive fact exists. But possession, involving the physical element of actual occupation, must continue to exist if the remedy by interdict is to be employed.

A field is left uncultivated and unoccupied. The possession is not lost unless the possessor intended to abandon it (*animo derelinquendi*) (C. 7, 32, 4); or it is occupied by an adversary.

Summer or winter pastures were left for a part of the year unoccupied; but possession was not thereby lost. (D. 41, 2, 3, 11; D. 43, 16, 1, 25.)

Possession was lost when the thing was occupied by any one with the intention of excluding the possessor.

Illustrations.

When a moveable was stolen, possession was lost by the possessor and acquired by the thief. (D. 41, 2, 15.)

A person bound hand and foot by trespassers on his own land, was held to be ejected, i.e., to have lost possession. (D. 43, 16, 1, 47.)

Titius has gone from home leaving no one in charge of his house. During his absence Gaius enters, and on the return of Titius prevents him entering by threats of violence. Titius loses possession. (D. 43, 16, 1, 24.) But at what time is possession lost, when Gaius enters or Titius returns? Labeo and the older jurists said it was when Gaius entered, who consequently was said to have a theftuous possession *clandestina possessio*. Apparently this was the case provided for by the interdict *de clandestina possessione*. (D. 10, 3, 7, 5.) But the necessity for that interdict disappeared, when it was held that possession was not lost, in the case stated, when Gaius entered, but only when Titius came to know that he had entered, or rather was repelled by force on attempting to turn him out, or from fear did not to try to recover the occupation. (D. 41, 2, 18, 3; D. 41, 2, 25, 2; D. 41, 2, 3, 7; D. 41, 2, 46; D. 43, 16, 5; D. 4, 2, 9, pr.)

2. Loss of possession by intention to give it up (*animo non corpore*). (D. 41, 2, 3, 6.) A possessor by agreement with another might transfer possession, without ever departing from occupation. What I possess in my own name, Celsus remarks, I may possess in the name of another. (D. 41, 2, 18, pr.)

Illustration.

Seia made a gift of a farm to her step-daughter by letter, and stated that she would continue to occupy the farm as a tenant, paying a yearly rent. This was held to

amount to a transfer of the possession, and therefore of the ownership, to the step-daughter; because Seia ceased voluntarily to be a possessor, and accepted the place of a mere occupier. (D. 6, 1, 77.)

II. Loss of possession by the act or default of an occupier.

1. When a servant or friend or farmer occupying land in the name of another was expelled by force, the possession was lost, even before a knowledge of the fact of ejection was brought to the possessor. (D. 43, 16, 1, 22.) When a tenant-farmer died, his landlord did not lose possession until an adverse claimant entered and occupied the land. But if the tenant went away and left the land without the intention of returning, the possession was at once lost. (D. 41, 2, 40, 1.)

2. Could possession be lost if the occupier, without ceasing to occupy, resolved no longer to hold for the possessor, but to hold for himself? Undoubtedly an occupier who thus tried to make his occupation a means of fraud would be a *mala fide* possessor, but would he not be a possessor? Would he not unite actual occupation with the intention to hold as owner, and are not these the only elements of possession? Such reasoning is unassailable; and if we regard possession as a mere anomalous separation of rights from investitive facts, there seems no reason why the argument should not have been given effect to. But if we admit that possession meant really equitable ownership, it would be highly inconvenient to allow a mere occupier by an act of fraud to make himself possessor, and entitle himself to the protection of the Interdicts. If that had been allowed, it would have been a serious drawback to a system of equitable rights for aliens. We find, as might be supposed, that this danger was guarded against, and in a very simple way. It was laid down that no one having been admitted as an occupier could by a mere act of will convert himself into a possessor; and that no one admitted to possession in a given capacity could of his own volition change that capacity.¹

Illustrations.

A ring is left in deposit with a jeweller. He resolves to deny the deposit, with the intention of fraudulently appropriating it to himself. He still continues a mere occupier, not a possessor; but if he removed it from the shop where it was left, he became at once possessor and a thief. Removing the ring from its place of custody is a *contrectatio*. (D. 41, 2, 3, 18.)

A tenant of a farm hearing of the death of his landlord, and that no heir was likely to

¹ *Nemo sibi ipse causam possessionis mutare potest.* (D. 41, 2, 19, 1.)

be found, resolved to keep the farm for himself. He is not a possessor, and hence, although in this case anciently his *mala fides* was no bar to *usucapio* (p. 123), he did not become owner by *usucapio*. (D. 41, 5, 2, 1.)

A tenant, professing to be owner, sells the farm occupied by him, and delivers it to the purchaser. As the tenant could not transfer what he had not, and as all he had was occupation (*detentio*), the purchaser did not become possessor. (C. 7, 32, 5.)

A tenant buys the farm he occupies from a person he believes to be heir to his landlord. He at once becomes possessor, even if that person proves not to be heir. (D. 41, 3, 33, 1.)

REMEDIES.—1. Remedies in respect of rights of possession of immoveables. The interdicts *de vi* and *quod vi aut clam* were the most ancient remedies for a possessor. In later times, however, it would appear that an alternative procedure by means of actions was allowed. The interdicts seem, indeed, to have been pushed aside by possessory *condictiones*. Thus we are told there was a possessory *condictio* for the recovery of land analogous to the *condictio furtiva* for stolen goods. (D. 47, 2, 25, 1.) Again, it is said that an owner could bring a *condictio* to recover his ownership, a possessor to get back his possession. (D. 13, 3, 2.) The distinction between *interdictum* and *condictio* consisted entirely in the forms of procedure (see Book IV., *Proceedings in Jure*); and after the changes made by Diocletian, there was no distinction whatever except in words.

2. The remedies in respect of the investitive fact of possession were the interdicts *uti possidetis* and *utrubi*. These interdicts could be used only for protecting possession, not for acquiring it.¹

FUSION OF POSSESSIO AND DOMINIUM.

This brief review of the chief rules relating to possession strengthens the conviction that the Roman Law had, under the name of possession, an institution running parallel with Quiritarian ownership. The extraordinary prominence given to the subject of possession in the Digest, and the circumstance that the investitive fact of possession was enforced by a procedure invented expressly for the purpose, appears to justify the language in which possession has been described as Equitable or

¹ If possession meant equitable ownership, it may be urged that there should be an interdict to enable a man to obtain possession of that he was entitled to, just as the interdict *quorum bonorum* was the means of enabling the equitable heir to obtain the inheritance. This objection appears at first formidable, because equitable ownership could hardly be considered complete unless there was some means by which the equitable owner could get possession of his effects. The answer may be given as a dilemma. A person entitled as Praetorian owner either had been in possession at some time, or he had not. If he had ever been in possession, and been ejected, his remedy was the interdict for recovering possession. If he had never been in possession, he could not be equitable owner. Why not? Delivery of possession was the investitive fact of equitable ownership; and, therefore, a person to whom a thing had not been delivered could not be owner. If he had any right at all, it was a right *in personam* against some specific individual, and his remedy would be an action on contract, or legacy, or the like. The action to acquire possession was thus an *actio in personam*.

Praetorian ownership. Leaving out of account the possibly doubtful case of the *ager publicus*, we find in the situation of aliens in Rome an urgent necessity for the creation of such a form of ownership; and we have seen that in the hands of the Praetor the doctrine of possession was developed in a manner that gave to aliens the practical enjoyment of property.

But the fate of equity is to be merged in law. Possession, at first an independent growth lying outside Quiritarian ownership, was destined to be fused with it. If the view above set forth of the history of possession be correct, it is obvious that after Caracalla, when "Roman citizen" was made a synonym for "subject of the Roman Emperor," the necessity for possession as a rival to the Quiritarian ownership disappeared. Long before that time, however, the utility of Praetorian ownership had been diminished. It is in this fact that an explanation must be sought for a circumstance that at first sight appears strange. The jurists nowhere apparently connect the doctrine of possession with the needs of aliens; but, on the contrary, speak of it as a subordinate part of the law of ownership. It is in this light that it is introduced to us by Gaius; a dispute as to possession is a mere preliminary to a *vindicatio*. The truth is, that in his time the Praetorian theory of possession had well-nigh done its work, and was becoming merged in the law of ownership, which, through its influence, had undergone a profound transformation. The tendency of "possession" to take the place of "ownership" is strikingly illustrated by a passage from Quintilian, which shows how the possessory interdict was employed as a means of testing the question of ownership: "In wagers under interdicts, although there is no question of ownership but only of possession, still we ought to show not merely that we have had possession, but that what we have possessed is our own."¹

In the final stage of development of the law of ownership, delivery of possession was the sole mode of conveyance. Possession, the investitive fact of equitable ownership, became the investitive fact of legal ownership, and entirely superseded the ancient *mancipatio* and *cessio in jure*. In other words, owner-

¹ *In sponsionibus, quae ex interdictis fiunt, etiamsi non proprietatis est quaestio sed tantum possessionis, tamen non solum possedisse, sed etiam nostrum possedisse doceri debeat.* (Quint. Inst. Orat. 7, 5.)

ship, according to the *Jus Gentium*, took the place of ownership *ex jure Quiritium*.

Another most important contribution to the law of property made through possession was agency. It was owing to the fusion of equitable and legal ownership that the power of acquiring property through a free representative was introduced into the Roman Law (p. 179.)

In the time of Justinian, then, the only difference between ownership and possession was, that to constitute ownership the possession must be derived from a person having a right to transfer the possession. A possessor could, at this period, with no propriety be called an equitable owner. If he were a *mala fide* possessor, he could not acquire the ownership; if he were a *bona fide* possessor, he was liable at any time, before prescription had given him a legal title, to be turned out by the real owner.

Thus, in the last stage of Roman Law possession has precisely the same meaning that it has in every system of law; it is a temporary separation between the person exercising rights and the person invested by law with the rights. The words of Gaius, in speaking of the distinction between Quiritarian and Bonitarian ownership, may be applied to the history of *Possessio ad Interdicta*, as well as to *Possessio ad Usucapionem*. Thus in the time of the XII Tables there is but one form of ownership (*dominium ex jure Quiritium*); in the time of Justinian there is but one form of ownership (*dominium*); but the ownership of Justinian is an institution that is separated from the Quiritarian ownership by a wide gulf—a gulf as wide and of precisely the same character as that which lies generally between the narrow and provincial system of the early Romans, and the liberal and magnificent jurisprudence bequeathed by the Roman Empire to mankind. In the other departments of law—in Contract, Inheritance, and Procedure—the progress of Roman Law, and the agencies by which it was accomplished, will hereafter be described. In the case of property the gulf between the jurisprudence of the XII Tables and the jurisprudence of the *Corpus Juris Civilis* was bridged over by the doctrine of equitable ownership, invented by the Praetors from the necessity of establishing a law of ownership for aliens. This is the first but not the only instance to be mentioned in which the relations of Romans with aliens exercised a profound influence on the development of their law.

QUASI-POSSESSION.

Possession has been defined as occupation by a person intending to exercise the rights of ownership; and a passage was quoted (D. 9, 4, 22, 1) to the effect that a mortgagee and a tenant-at-will had possession without any intention of holding as owners. These cases are mentioned in a manner that proves them to be exceptions to a general rule. Again, we are told that only corporeal things can be possessed (a statement that reminds us of the fact that *traditio* also was confined to corporeal things), while an incorporeal right (*jus incorporale*) could not be possessed. (D. 41, 3, 4, 26; D. 41, 2, 3, pr.) The meaning of this cannot be mistaken. To say that only a corporeal thing may be possessed, means that possession is allowed with respect to the ownership of the thing, but not to any interest in the thing less than ownership.

The opinion thus set forth by Paul was unquestionably accepted by the Roman jurists; but it proceeds upon an imperfect apprehension of the distinction between ownership and other rights *in rem* to things. Ownership is simply the largest aggregate of rights *in rem* to things, and is as truly incorporeal as a single right *in rem*; as, for example, a private right of way. Servitude and ownership are equally incorporeal in so far as they are rights; they are equally corporeal in the sense that as rights they exist only with reference to some definite corporeal thing. To say that an estate in land for life is an incorporeal thing, but an estate for ever is corporeal, is an absurdity.

When, therefore, Paul says that corporeal things can be possessed, but not an incorporeal right, he commits himself to a false distinction based upon a blunder. For it is manifest that an incorporeal right (to repeat the tautological language of Paul) may be the object of possession, in precisely the same sense as corporeal things may be the object of possession. Possession arises from a disturbance of the normal union in the same person of a right and the appropriate investitive fact. Now such a separation may exist in respect of any group of rights *in rem* as well as of ownership. A right of way, for example, was created by one of several facts; when, therefore, a person used a way as a right without having obtained it by one of these facts, he stood in precisely the same relation to the right of way as one that occupies land does to the land if it does not belong to him. A possessor is simply one that exercises a right without being invested with it in any manner appointed by law; and this is just as true of a single right *in rem* as of ownership.

Having been led by these blundering distinctions between corporeal and incorporeal things to deny, in contradiction of manifest fact, that there could be possession of a usufruct or other interest falling short of ownership, the Roman jurists proceeded to extricate themselves by a little artifice of language. They said there is possession of a thing with a view to ownership; there is quasi-possession of an (incorporeal) right. There is in truth nothing *quasi* about such possession; but as the jurists had formally dismissed possession, they could not venture to take it back without slightly changing its name. Measured by a logical test, the propositions of the jurists are sufficiently absurd, but their inconsistency had a meaning of which perhaps in the later period of the Empire they were not themselves altogether aware.

If we suppose that at first the Roman Law provided no remedy for an occupier unless he held as owner, the confusion of the jurists would admit of easy explanation. If the possessory interdicts were at first used only in the case of equitable ownership, but subsequently were extended to lesser interests in things, we can understand the propriety of the language used by the jurists. Possession and quasi-possession are logically the same, but chronologically the prefix *quasi* marks a later growth. If this be the true meaning of *quasi-possession*, it would afford no inconsiderable support to the views set forth above as to the history of possession. Naturally, if the possessory

interdicts were introduced for the benefit of aliens, they would be given first to the largest interest in things—namely, ownership; and necessarily they would be extended to the lesser interests in order to complete the system of equitable rights. Are we, then, justified in assigning a historical origin to the distinction between possession and quasi-possession?

1. The first group of limited rights *in rem* is called Personal Servitudes, the leading member of which is *usufructus*. A usufructuary had quasi-possession.¹ (D. 43, 16, 3, 17; D. 4, 6, 23, 2.)

Now the perplexing fact is, that although a usufructuary had not possession, he had all the rights of a possessor. He could bring the interdict *de vi et vi armata* (D. 43, 16, 3, 15), the interdict *quod vi aut clam* (D. 43, 24, 12; D. 43, 24, 13, pr.), and the interdict *uti possidetis*. (D. 43, 17, 4.) What, then, is the meaning of this apparently unaccountable inconsistency; the granting to a usufructuary all the rights that constituted possession, combined with a stern refusal of the name? The secret is explained by a passage from Venuleius. He tells us (Vat. Frag. 91) that the interdict *de vi et vi armata* could not, in its original form, be used by a usufructuary, because he was not a possessor. But for his benefit the interdict *de vi* was modified; the terms of the new interdict were, "If he is alleged to be prevented by force from enjoying the usufruct"—"*Si uti frui vi prohibitus esse dicitur*." The prefix *quasi* to the possession of the usufructuary is thus explained. It means that the rights of the usufructuary are posterior to the establishment of the doctrine of possession; and that it is by a new application of the original interdicts that a usufructuary is secured in the enjoyment of rights precisely as if he were a possessor. The owner is still called possessor; no doubt, in that order he might be able to employ the interdicts against all persons except the usufructuary. (D. 41, 2, 52, pr.)

The next three examples of Personal Servitudes—*Usus*, *Habitatio*, *Operae Servorum*—do not afford any matter for observation after what has been said of *usufructus*.

Although it is not included by Gaius or Justinian in the class of Personal Servitudes, *Precarium* must, in logical consistency, be added. *Precarium* may indeed be defined as a usufruct terminable at any moment by the will of the owner. Now, if a usufructuary—a tenant-for-life—is not a possessor, surely a tenant-at-will cannot have possession. Yet nothing is more certain than that he had. (D. 43, 26, 4, 1.) *Precarium* exhibits a perfect contrast to *usufructus* in respect to the doctrine of possession. In the case of usufruct there was no question that the owner had possession; the doubt was as to the usufructuary. In the case of *precarium* there is no question that the tenant-at-will had possession, but it was doubted whether the owner had possession: the better opinion was that he had not. (D. 43, 26, 15, 4; D. 41, 2, 3, 5; D. 41, 2, 5, 15.) The owner was not possessor; nevertheless he could bring the possessory interdict *de precario*. (D. 43, 26, 2, pr.) The explanation of this strange accumulation of inconsistencies is deferred until the analogous case of *pignus* is considered.

2. In Praedial Servitudes the distinction between right and possession is throughout sustained. There are numerous possessory interdicts for servitudes. Let one example suffice. The Praetor says: "I forbid you (the defendant) preventing the plaintiff by force from continuing to use the right of way (*iter*, *actus*, or *via*) now in dispute, that he has used during the present year neither by force, nor stealth, nor by your leave."

¹ The language of the jurists is, however, by no means uniform; and, in fact, is consistent only in denying *possessio* to a usufructuary. (D. 43, 26, 6, 2.) Venuleius adds, the *possessio* of land held in usufruct remains with the owner (*dominus proprietatis nuda*). (D. 41, 2, 52, 3.) Gaius says the usufructuary has not possession, but only a right of enjoyment (*jus utendi fruendi*). (D. 41, 1, 10, 5.) Again, Ulpian says that a usufructuary has natural possession (D. 41, 2, 12, pr.), or occupation (*detentio*) merely. (D. 43, 3, 1, 8.)

(D. 43, 19, 1, pr.) It was held that the use must have been for thirty days. (D. 43, 19, 1, 2.) This interdict proceeds not upon the right of the plaintiff to use the road, but upon the fact that he had used it for thirty days, without any hindrance, in an open manner. If he succeeds, the owner of the land burdened with the right of way may proceed by an *actio negatoria* to prove that the plaintiff had no right accruing from any investitive fact. It is manifest at a glance that interdicts like that quoted are framed on the model of the interdict *utrubi*. Moreover, it deserves to be remarked that the word *possess* does not occur; the road is "used." (D. 43, 19, 1, 2.) The interest that supported such interdicts was called quasi-possession.

If we suppose that the Praetor meant, under the name of possession, to establish ownership for aliens, it was incumbent on him to extend relief to servitudes. In Italy a right of way was a *res mancipi*. If now the Praetor gave an alien ownership of a house, he was bound to guarantee him the use of a right of way, through which alone it might happen access could be had to the house. Other reasons, especially of convenience, may have contributed to the result; but the necessities of the aliens seem adequate to explain, without any assistance, the extension of the doctrine of possession to servitudes.

3. Under the head of Perpetual Leases two species are enumerated—*Emphyteusis* and *Superficies*. The *emphyteuta* had possession (D. 2, 8, 15, 1), and probably also the person that had a right to a *superficies* (D. 43, 17, 3, 7; D. 13, 7, 16, 2); although Savigny thinks not. The *emphyteuta* was practically owner, subject to the payment of an annual rent. But *emphyteusis* was an institution of late origin, its true position never being exactly defined until the constitution of Zeno, between A.D. 475 and A.D. 491. As *emphyteusis* took its place in the law long after the doctrine of possession was developed, it has little value as throwing light on the origin and meaning of that doctrine.

4. The last group to be considered is Mortgage. Of the three forms of mortgage subsequently described (see Book I., Second Sub-Division—Mortgage), one only is of interest in connection with the topic of possession, namely, the *pignus*. A creditor had a thing as *pignus* when it was delivered to him by the debtor as security for his debt, without any formal undertaking to return it on payment of the debt. The creditor had possession. Now, a creditor did not hold as owner (*opinioe domini*), but had a right merely to the custody of the thing pledged; and, in the last resort, a right of sale. Of the several rights of ownership—a right to keep, to enjoy, and to alienate—he had the first absolutely; he had not the second at all, and the third only conditionally. Nevertheless he was possessor, and entitled to the possessory interdicts.

These two, then—*pignus* and *precarium*—are the only exceptions to the rule that possession means occupation, with the intention of exercising the rights of ownership. Their character, in respect of possession, is distinctly anomalous, and is not reconcilable with the position assigned to *usufructus*. So glaring an inconsistency cannot be explained except on the assumption that there is a history behind it. Is there any clue in the known facts to the origin of an irregularity so remarkable?

Pignus is reckoned by Justinian among the contracts *ex re*, in defiance of all sound classification; for the creditor had rights *in rem* to the pledge, and not merely rights *in personam* such as contracts give rise to. Justinian did not place *precarium* in the same class of contracts, but he would have done so if he had been guided by logical considerations. Indeed, in one aspect, both *pignus* and *precarium* are contracts *ex re*. The obligation of the creditor and of the tenant-at-will to return the property in their charge was based on contract. It was held that the delivery of a pledge to a creditor implied an obligation to return the thing when his claim was satisfied. In like manner, by accepting land to hold at the owner's will, the tenant undertook to return the land when the owner demanded it. But there was a notable difference

between *pignus* and *precarium*. The remedy of the debtor was by *actio*; the remedy of the landlord by *interdictum*. Even this distinction in later times vanished; for an *actio in factum* was given to the landlord in every respect the same as the actions given to a debtor. The characteristic of the contracts *ex re*—that they are based on equity—was shared by *precarium*. (D. 43, 26, 2, 2.)

The remedy given by the Praetor in equitable contracts was intended to fill a gap. But for the action given by the Praetor, a debtor that had given a thing in pledge to his creditor would have had no means of recovering it after he had paid his debt. By analogy, it may be inferred that the interdict *de precario* was introduced, because without it a landlord would have had no means of ejecting a tenant-at-will. Prior, then, to the intervention of the Praetor, a tenant-at-will and a creditor were really possessors (for although they were dishonest, they held as owners), and as such were entitled to all the possessory interdicts. But when the Praetor interfered, he was content to protect the owner, and did not proceed to deprive the creditor or tenant-at-will of the security that the possessory interdicts afforded them. Hence the puzzle of the jurists who, on the one hand, would not admit that two persons could possess each the whole of any given thing, just as two persons could not stand on the same space of ground; and on the other, were obliged to make the landlord a possessor as well as his tenant-at-will, and the debtor a possessor, although only *ad usucapionem*. (D. 41, 2, 1, 15; D. 41, 3, 16.) If this be the true explanation of the anomalous position of the creditor and tenant-at-will, it is but one additional example of the spirit of Roman equity, not to pursue logical symmetry at the expense of practical justice and established rights.

If the theory of possession now sought to be established be correct, that possession means equitable rights *in rem*: we ought to find not merely the presence of equitable rights *in rem* where there are rights *in rem ex jure Quiritium*, but also the absence of equitable rights *in rem* where there are no rights *in rem ex jure Quiritium*. A brief examination shows that there is a complete negative as well as positive correspondence between the two classes of rights.

1. In the group of contracts *ex re* two may be mentioned—*depositum* and *commodatum*—that give rise to no rights *in rem*; in these also there can be neither possession nor quasi-possession. The depositoe and borrower were said to have mere occupation (*detentio*). (D. 41, 2, 3, 20; D. 13, 6, 8.) In one case alone did a depositoe (*sequester*) have possession; but that rule was adopted from special motives that have no importance with reference to the general theory of possession. (D. 16, 3, 17, 1.)

2. Among consensual contracts, letting to hire presents itself as in many respects analogous to tenancy-at-will. But neither a tenant of a house (*inquilinus*) nor a tenant of a farm (*colonus*) had any right *in rem* or possession. (D. 43, 16, 1, 22; D. 41, 2, 25, 1; D. 43, 26, 6, 2; D. 43, 16, 20.) To appreciate the significance of this fact, a comparison must be made with *precarium*.

Titius goes to Sempronius and asks leave to occupy a farm. He offers no rent, but on the other hand is to quit the farm when required.

Gaius goes to Sempronius and asks another farm for a year. He is to pay no rent, but at the end of the year is to quit the farm.

Maevius goes to Sempronius and asks another farm for a year, agreeing to pay rent.

Titius has a right *in rem*; he is a possessor; but neither Gaius nor Maevius have any right *in rem* or possession. (D. 41, 2, 10, 2.)

The explanation of such an inconsistency must be sought in history, in the greater antiquity of *precarium*, and in the circumstance that the tenant-at-will was able to hold against his landlord practically as owner, until in the interest of justice the Praetor interfered, and while allowing the tenant to hold the land against third parties, compelled him to surrender it to his landlord.

3. The last illustrations are taken from the law of procedure—the *missio in possessionem*. Notwithstanding the presence of the word possession, there was nothing more than occupation for safe keeping (*detentio, custodia*). (D. 6, 1, 9.) The person in charge was protected by the Praetor, but not by means of the possessory interests.

SAVIGNY'S THEORY OF POSSESSION.

Two questions, it may be said, have sorely tried the patience and ingenuity of legal writers. The first is, what sort of right has the man that has possession, and nothing more? and, secondly, why should he have any right at all? It is important at the outset to confine these inquiries rigorously to the *mala fide* possessor, because the moment *bona fides* is introduced we have to deal with totally different conceptions from those attached to mere possession. A *bona fide* possessor was one that acquired a thing in a manner to justify him in regarding himself as owner. *Bona fide* possession arose in two ways. (1.) When a *res mancipi* was delivered by an owner without *mancipatio*. Here the possessor was on the way to be owner, and no one had morally any claim except himself. In the later law, by the *actio Publiciana*, he was made to all intents and purposes owner. (2.) A person might obtain a thing by *mancipatio*, but from one that had no right to alienate, either because he was not owner, or, if owner, was forbidden by law to alienate. This is the converse case. In the former, the true owner conveys the possession simply, without the proper transvestitive fact, and the difficulty that arises is purely technical; in the latter, a person, not having a right to convey, does so by the proper transvestitive fact. In this case the buyer is deceived, and there may arise a real conflict between his interest and the true owner's rights. That conflict was terminated in one of two ways: within a limited time the true owner might recover his property, leaving the *bona fide* possessor to his action for damages (if any) against the person that deceived him; after that time, the rights of the owner were extinguished in favour of the reasonable claims of the *bona fide* possessor. In the case, therefore, of *bona fide* possession, the possession is the least part of the case; the law really deals with it on obvious considerations of justice. *Bona fides* lies at the root of the Roman doctrine of *usucapio*, and hence one reason for the extreme shortness of the ancient prescription.

It is, therefore, with the *mala fide* possessor alone that we have to deal; with the man that exercises the rights of an owner without even the pretence of being invested with them by any of the modes by which alone he can acquire those rights. Savigny starts with the proposition that to such possession no juridical effect whatever can be attributed. A person taking a thing without any investitive fact, and determined to hold it against all the world, has nothing that can be called a right. But suppose some one (and for clearness' sake let us suppose one having no better right) assaults the possessor and drives him out. Here, says Savigny, is a new element. An assault has been committed; an assault is a violation of a personal right; and for that assault the assailant exposes himself to an action. But if only ordinary damages are assessed, it will be no punishment to the assailant. His object was to get possession, and if he is allowed to retain that, he may laugh at any trifling sum required to compensate for his violence to the person of the possessor. In order, therefore, to give a complete remedy for the assault, the assailant must be made to restore the *status quo*; he must give back possession. By this indirect and circuitous way protection is afforded to the possession in giving justice to the possessor. The possession as well as the person of the possessor is protected. The restitution of possession is merely incidental to the relief given for assault.

Savigny's theory answers at once both the questions propounded—What sort of right has a mere possessor, and why should he have any right at all? But were these the ideas that guided the Praetors in creating possessory interdicts, which, be it remembered, were not a remedy for the personal assault at all, but only for the pos-

session? If they were, it is obvious that they apply with equal force to moveables and immoveables. A man that knocks another down to rob him of his gold ring, employs the assault as a means to an end, quite as much as if he assaulted a man to turn him out of his house. If Savigny is correct, the Roman Law ought to have extended the same indirect protection to the thief that it did to the *mala fide* possessor of immoveables. Now, as we have seen, that was precisely what it did not do. For while a thief had no remedy against a thief, a stealer of land—if we may use a parallel expression—had a legal remedy against one stealing from him.

According to Savigny's theory, the possessory interdicts are essentially actions to protect rights; but the right, according to him, is primarily a right to the person. The function of the interdicts *de vi* and *quod vi aut clam* is obviously to protect rights—not of the person, but to things. To suppose that these interdicts were created for the protection of the *mala fide* possessor is very hard. These were, in fact, the only remedies of the owner. It may be said, not of the owner, unless he were in possession, which is quite true; but if the owner had never been in possession, he had his proper action as an owner. Probably, in ninety-nine cases out of a hundred, these interdicts were used by owners. It seems, therefore, a complete inversion of the true relation of things to assume that an owner of land, for example, had no right antecedent to his being assaulted.

The points in which Savigny differs from the views set forth in this work are the following:—(1) He did not distinguish between interdicts as remedies for violations of admitted rights (actions *ex delicto*), and as remedies for investitive facts. He thus missed the striking and important parallelism between the *actio sacramenti* and the interdicts *Uti possidetis* and *Utrubi*. (2) He overlooked the practical use of the interdicts *de vi* and *quod vi aut clam* in respect of ownership, as the only remedies provided for the violation of rights to immoveables. (3) These errors led to a third—to the supposition, namely, that interdicts were established in the interest of the *adverse possessor*, and to support this strange view by a somewhat far-fetched metaphysical theory. He thus failed to perceive why *bona fides* was irrelevant to Interdict-Possession. (4) In seeking a historical reason for the prominence given to possession, he relied altogether upon Niebuhr's hypothesis as to the position of the *Ager Publicus*—a hypothesis that can scarcely be said to be beyond the reach of assault—while he overlooked the obvious needs of aliens. This disabled him from writing the history of the Roman law of Ownership, or perceiving its affinities with the history of contract. (5) By his theory of *derivative possession* he hid from himself the purely historical and accidental meaning of Quasi-Possession in the Roman Law.

II.—PERSONAL SERVITUDES.

RIGHTS IN REM TO THINGS, INDEFINITE IN POINT OF USER, BUT LIMITED IN DURATION.

Property (*dominium*) is an aggregate of rights,—of the various and indefinite rights of possession and enjoyment, and the right of alienation. The most perfect example of property is the rights possessed by a man *sui juris* and of full age over his clothes. His power of enjoying, altering, destroying, or alienating his clothes is quite unrestricted. This is property in its fulness. But we still continue to call him owner even when his powers are less complete. Suppose he is interdicted as a

spendthrift, and forbidden to sell his property, nevertheless he is called owner. In this case the restraint on alienation is imposed exclusively for his own benefit, and it may seem reasonable to regard him as owner. But the term continues to be applied, as in the case of the ownership of the *dos* by husbands, when the property is inalienable not in the interest of the owner, but of a person whose right may be looked upon as hostile. Hence, although the power of alienation is a most vital part of ownership, it may be wholly wanting, and still the usage of legal writers requires us to call the residue ownership.

In another direction ownership may be abridged without ceasing to obtain the name. The enjoyment of property may be restricted. A common case is where an owner of land is obliged to permit an adjoining proprietor to walk or ride through his land. The exclusive possession of the owner is thereby limited, but still he is called owner. This case is a type of many others, where a person, in opposition to the owner, has a single, definite right over his land. This is a servitude in the strictest sense. But there may be a larger inroad upon the ownership—the entire use and enjoyment of the land (*usus-fructus*) may be given for a limited period, or for life. The usufructuary has almost as full a right to the use and produce of the property as the owner; the only distinction between them is, that the owner alone has a right to destroy the substance of the property. Yet what remains, after a usufruct is subtracted, is still called ownership (*dominium*).

In the Roman Law, when the enjoyment of the owner is curtailed, his property is said to be in servitude (*res servit*). When the enjoyment is in no way restricted, the property is said to be free from any servitude—to have freedom (*libertas*). In this sense, a usufruct was as much a servitude as a right of way; both are modes of enjoyment of land in opposition to the owner. But there is an important difference between them. A right of way, of walking or riding through another's land, is a single, definite, simple use; a usufruct, implying a right to all the produce of the land, is as indefinite and nearly as extensive as ownership itself. Usufruct, in short, has one of the essential features of ownership; it is a right to the enjoyment of land, not capable of definite limitation, and which, like ownership, admits only of a negative description.

A right of way admits of exact and positive definition; one can state fully and accurately the extent of enjoyment it

confers. A usufruct and a right of way, although both burdens (*servitudes*), are thus more opposed to each other even than they are severally to ownership. Usufruct comes near ownership; a right of way is very remote from it: usufruct is a very large and indefinite fragment of the enjoyment; a right of way is a very small one, and perfectly definite. If we were to invent a terminology for these two classes of servitudes, we might call a usufruct an *indefinite* servitude, a right of way a *definite* servitude. The only doubt is whether usufruct ought to be called a servitude. In truth, a usufruct is contrasted with ownership, not in respect of the extent of enjoyment, but only in respect of its duration. A usufructuary could not transmit his right to his heirs; an owner could. The limits to the enjoyment of the usufructuary really arise from the fact that his interest terminates with his death, and that he must therefore hand on the property unimpaired. Why, then, not call a usufructuary an owner for life? In some modern systems of law we prefer to speak of limited owners, or persons having an estate (not an easement or servitude) for life. But in Roman Law we must religiously abstain from doing so. The fact that a usufruct was originally inalienable is sufficient to mark the contrast with ownership. It was regarded as a burden or deduction from ownership; and in the Roman Law, it must ever be remembered, ownership and usufruct are opposed to each other, and upon no account can the title of *dominus* (with whatever qualification) be given to the usufructuary.

The distinction between these two classes of servitudes is described by the Roman jurists from a different and less satisfactory point of view. Marcian says that servitudes belong either to persons, as usufruct, or to things, as urban and rural servitudes (*servitudes personarum*, *servitudes rerum* or *praediorum*). But for the solecism of attributing servitudes to things (for every servitude must belong to a person), the language might be thus defended. A personal servitude is given to an individual for his enjoyment, and dies with him; a praedial servitude is given to an owner for the better enjoyment of his land, and follows the land. But this distinction does not altogether agree with the difference between indefinite and definite servitudes. It is true that all the indefinite servitudes are personal, but so are some of the definite servitudes. Thus the right of taking water from an artificial reservoir, which is a definite servitude, might either be attached to land or be given to a

person unconnected with the adjoining land, in which case it did not go to his heirs. (D. 43, 20, 1, 43.) But we read that a right to pluck apples on another man's ground, or to walk about his ground, or to sup in his house, cannot be granted as a personal servitude. (D. 8, 1, 8.) There is indeed no reason why definite servitudes should not be given to individuals not owners of adjoining lands, although in the Roman Law this was very rarely allowed. On the other hand, no indefinite servitude was attached to the ownership of land, and from the nature of the case could hardly be, so that a proper classification of servitudes need not embrace more than three classes.

A. Indefinite Servitudes; *ususfructus*, *usus*, *habitatio*, *operæ servorum* [*precarium*].

B. Definite Servitudes. Rights of way, of water, &c.

(A.) Attached to the ownership of adjoining land:—urban and rural servitudes.

(B.) Not so attached. Right to draw water from a reservoir (*ex castello*).

USUSFRUCTUS.

DEFINITION.

A usufruct is the right of using and taking the fruits of anything that is not consumed by use for the lifetime of the person receiving, unless another time is fixed.

Usufruct is the right to use and enjoy what belongs to another; but its substance must remain unimpaired. (J. 2, 4, pr.)

Its exact character, as related, on the one side, to ownership (*dominium*), and on the other to servitude, is the subject of conflicting statements. Paul says (D. 50, 16, 25, pr.) that an owner is none the less so because another person has got a usufruct in his property, for a usufruct is not a portion of ownership, but is of the nature of a servitude. But the same writer, in another passage (D. 7, 1, 4), observes that for many purposes the usufruct is a part of the *dominium*. Elsewhere usufruct is regarded as a personal servitude; but in the Institutes it is taken separately, and mentioned in a manner that suggests contrast with servitude. (*Haec de servitutibus et usufructu et usu et habitatione dixisse sufficiat.*) (J. 2, 5, 6.)

A person having the ownership of property in which another has a usufruct, is called simply *dominus*, or *dominus*

proprietas nuda; and that other is called *Fructuarius* or *Usufructuarius*. The property is called *res fructuaria*.

Quasi-Usufruct.—The above definition requires modification. It applies to those things only that are not consumed in the use (*salva rerum substantia*); but a modification was allowed, and a sort of usufruct (which after the usual terminology of the Roman Law was called *quasi-usufruct*) in things consumed by use was authorised.

A usufruct may be established not only in a field or a house, but also in slaves and beasts, and in fact in everything except what is consumed by the very fact of use: for in this case neither natural reason nor that of the civil law admits a usufruct. In this latter class must be reckoned wine, oil, wheat, and garments; and closely akin to these is coined money, for by the very act of use in continual exchange it in a way disappears. But for convenience' sake the Senate resolved that a usufruct even of these things may be established, if only suitable security on that score be given to the heir. If, therefore, a usufruct in money is left as a legacy, the money is paid over to the legatee and becomes his; but he gives security to the heir to restore a like amount in the event of his dying, or undergoing *capitis minutio*. Other property, too, is delivered to the legatee, and becomes his, but only after it is duly valued, and security given that in the event of his dying or undergoing *capitis minutio* a sum of money shall be restored equivalent to the value placed on the property. The Senate, therefore, did not create a usufruct of those things; nor indeed could it; but by exacting security it established a quasi-usufruct. (J. 2, 4, 2.)

The date of this *Senatus Consultum* is unknown. It is posterior to the time of Cicero (Top. 3, 15), and it existed in the time of Sabinus, who lived in the reign of Tiberius. (D. 7, 5, 5, 1.)

In a quasi-usufruct, the usufructuary was a true *dominus* or owner, subject to the duty of restoring the value of the property at a future time. There was thus no true usufruct, but rather an ownership analogous to the *dos* in the case of *res aestimatae*.

Even debts could, according to Proculus and Cassius, against the opinion of Nerva, be the object of such a quasi-usufruct. When a creditor gave a debtor the usufruct of his debt, it was tantamount to a remission of interest during the life of the debtor. (D. 7, 5, 3.)

A usufruct of money was terminated only in one of two ways,—by the death or *capitis deminutio* of the quasi-usufructuary. (D. 7, 9, 7, 1; D. 7, 5, 9; D. 7, 5, 10.)

A quasi-usufruct of a servitude, such as a right of way, could not be created according to the strict principles of the civil law, because there could not be a servitude of a servitude (*quia servitus servitutis esse non potest*); but an action was allowed nevertheless (*actio incerti*); or the same end might be accomplished in another way, by granting the servitude conditionally, so that if the donee died, or suffered a *capitis deminutio*, the servitude should be restored. (D. 33, 2, 1.)

In the text, dress (*vestimenta*) is spoken of as a proper object of a quasi-usufruct; but Ulpian says that if dress is consumed by ordinary tear and wear, nothing has to be returned by the usufructuary (D. 7, 9, 9, 3); and in another passage (D. 7, 1, 15, 4) he treats dress as the object of a proper usufruct, subject only to the condition that if ordinary wearing apparel it must be worn by the usufructuary, and not let for hire. If

dress were regarded as the object of a quasi-usufruct, its value would have to be returned; if as a proper object of a usufruct, nothing would be returned if the dress were fairly worn out. Which view ought to be taken in a particular case would depend wholly upon the intention of the donor.

The *cautio* or security required was the usual one—sureties (*fidejussores*). (D. 7, 5, 8.)

RIGHTS AND DUTIES.

A. Rights of the Usufructuary (*Fructuarius*).

I. USE AND ENJOYMENT.—Generally, the usufructuary has a right to everything fairly included in the words use and produce (*usus fructus*), unless there is some limitation in the instrument under which he claims.

He to whom the usufruct in a farm belongs, becomes owner of the fruits only if he actually gathers them. Although, therefore, the fruits are ripe when he dies, if they are not yet gathered they do not belong to his heir, but are acquired by the owner. Much the same may be said of the tenant-farmer (*colonus*). (J. 2, 1, 36.)

A difference existed on this point between the usufructuary and the *bona fide* possessor. The latter acquired all the fruits that were separated (*separatio*), whether by the hand of man or not; the usufructuary only those that he, or any one for him, gathered (*perceptio*). (D. 7, 4, 13.)

Hence fallen fruit (*glans caduca*) did not belong to the usufructuary unless gathered. (D. 50, 16, 30, 4.) So if the fruit was stolen, although the usufructuary had an action against the thief (*actio furti*), he was not owner, and the *condictio furtiva* could be brought only by the *dominus*. (D. 7, 1, 12, 5.) Fruit gathered by the usufructuary before it was ripe was nevertheless his property. (D. 33, 2, 42; D. 7, 1, 48, 1.)

APPORTIONMENT.—A *fructuaria* died in December, the crop having been previously taken off the ground by her tenant (*colonus*) in October. The rent was not due till March. Which was entitled to the rent up to March—the heir of the *fructuaria* or the owner of the farm? The heir of the *fructuaria*. (D. 7, 1, 58.)

Fructus, being a term of wide generality, conveys an imperfect idea unless it is completed by particulars. Generally, we may say, the usufructuary could take the *usus* and *fructus*, and he could not do more. We must now specify, with reference to different objects, what the powers of the usufructuary were.

1. Lands, whether cultivated or not.

1°. Farm Stock.—Ulpian says that unless a contrary intention appeared, the instruments attached to a house or farm were included in the usufruct; as, *e. g.*, the vessels used in the preparation or storing of wine (*dolium, cupa, cadus, amphora, seria*). (D. 7, 1, 15, 6.) The same jurist states that the usufructuary could only use, not sell, those things. (D. 7, 1, 9, 7.)

2°. *Alluvio*.—Paul says that *alluvio* belonged to the *dominus*, and not to the usufructuary (Paul, Sent. 3, 6, 22); but Ulpian says it goes to the usufructuary; but other accessions, as an island rising in a river, do not. (D. 7, 1, 9, 4.)

3°. Wood and Timber.—The usufructuary cannot cut fruit-trees (D. 7, 1, 13, 4), nor large trees (D. 7, 1, 11); but he may take branches as stakes for his vines, if it can be done without injury to the land. (D. 7, 1, 10.) If the trees are dead or overthrown by the wind, Labeo says the usufructuary can take them for the repair of his house,—not for firewood, unless he cannot get firewood elsewhere. (D. 7, 1, 2; Vat. Frag. 70.) Greater freedom was given him in dealing with *silva caedua*. *Silva caedua* is that which grows, and is cut down periodically; or, according to Servius, what springs from roots or stumps when cut down; he added that such belonged to the usufructuary. (D. 50, 16, 30.) Certainly this was so, if the revenue of the land was derived from osiers (*arundo, palus*). (D. 7, 1, 59, 2.) Probably the usufructuary was always entitled to such crops, if he kept up the stock. (Vat. Frag. 70.)

4°. Minerals.—The usufructuary can burn lime or dig for gravel for his house. (D. 7, 1, 12.) He can also work, in a husband-like manner, quarries, or clay, or sand-pits (*lapidicinae, cretifodinae, arenae*) (D. 7, 1, 9, 2.) Also he can open, or use when opened, mines of gold, silver, copper, iron, etc., even to the prejudice of the agriculture, if such is a better use of the property. (D. 7, 3, 13, 5; D. 7, 1, 9, 3.)

6°. Bees on the land belong to the usufructuary; and he has the right of fishing, fowling, and hunting. (D. 7, 1, 9, 1; D. 7, 1, 9, 5; D. 7, 1, 9, 2.)

2. Houses.

The usufructuary has complete use of the buildings, subject to the limitations hereafter stated. If they were let when the usufruct began, he is not entitled to the rent (*pensio*); but neither is he bound by the contract with the tenant. If he is obliged to recognise the tenant by the deed of gift, he is then

entitled to the rent. (D. 7, 1, 59, 1.) The same rule applies to a farm when let.

The usufructuary must not alter the character of the building. He cannot add a wing (D. 7, 1, 7, 3), nor divide a room into new chambers, nor throw several rooms into one (D. 7, 1, 13, 7), nor convert a private dwelling-house into a shop, or stables, or into a public bath (D. 7, 1, 13, 8), even although that were the most profitable use to put it to. (D. 7, 1, 14.) If, however, the owner used the house for business, so might the usufructuary. (D. 7, 1, 27, 1.) The usufructuary cannot even finish an unfinished house (D. 7, 1, 61, 1), nor put a roof on bare walls. (D. 7, 1, 44.) He may open, but cannot close, windows. (D. 7, 1, 13, 7.) He cannot put up a new building unless it is required for his crops or for guarding the land (D. 7, 1, 13, 6; D. 7, 1, 73); and he cannot pull down any buildings (D. 7, 1, 13, 4), not even those he has himself built. (D. 7, 1, 15.)

3. Slaves.

The responsibility of the master for the delicts of his slave remains unimpaired notwithstanding the usufruct, and the usufructuary may even call upon him to transfer the ownership, or pay damage for any delict done by the slave to him or his. (D. 7, 4, 27.)

The offspring of a female slave is not reckoned among fruits, and so belongs to the owner. For it seemed absurd to reckon a man among fruits, seeing that all the fruits in the world are furnished by nature for man's sake. (J. 2, 1, 37.)

Ulpian tells us that it was an old question, whether the children of slaves formed an exception to the rule that the young of animals were *fructus*, and says that the opinion of Brutus in favour of the exception ultimately prevailed. (D. 7, 1, 68.) Brutus lived before Cicero.

The usufructuary, having a right to the labour of the slave, could inflict moderate chastisement to compel him to work; but he could not put him to the torture, or lash him, or otherwise impair his value as a wealth-making machine. (D. 7, 1, 66; Paul, Sent. 3, 6, 23; Vat. Frag. 72.) He must also use the slave for the work for which he had been trained, and could not, *e. g.*, turn a musician into a major-domo, or an actor into a bath-keeper. (D. 7, 1, 15, 1.)

As regards slaves in whom we have a usufruct only, it is the received opinion that all they acquire by means of what is ours or by their own labour is acquired for us; but that all they acquire on other grounds belongs to their

owner. If, therefore, such a slave is appointed heir, or has a legacy left him, it is not I but the owner that acquires the profit. (G. 2, 91.)

The question is asked whether we can possess anything or acquire it by use through a slave in whom we have a usufruct, seeing that we are not in possession of him. For, of course, if we possess a man in good faith, we can, without doubt, both possess and acquire by use through him. In regard to both characters, however, we speak in accordance with the distinction that we have just set forth, that only gains made by means of what is ours, or by their own labour, are acquired for us. (G. 2, 94.)

The statement of Labeo (Vat. Frag. 71) substantially corresponds with § 01 from Gaius; but Labeo makes the distinction turn on the intention of the donor: if the donor intended to give to the usufructuary, then he obtained the gift; if to the owner, then the owner gets it; and this distinction is supported by the Digest. (D. 7, 1, 22.)

4. Animals.

Among the fruits of animals are reckoned their young, as well as their milk, hair, and wool. And so lambs, kids, calves, and foals become at once, by the *jus naturale*, the property of him that has the usufruct. (J. 2, 1, 37.)

The rights of the usufructuary varied according as he received the animals singly, or in a flock or herd. If he received them as individuals and any of them died, he was not bound to replace them (D. 7, 1, 70, 3); although in that case he was not entitled to their flesh. (D. 7, 4, 30.) But if a flock or herd is given, a different rule prevails. (Paul, Sent. 3, 6, 20; D. 7, 1, 68, 2.)

But if a man has the usufruct in a flock, he ought out of the young to supply the place of those that die, as Julian held; and also to plant other vines and trees in place of those that die. For he ought to cultivate properly, even as a good *paterfamilias* would. (J. 2, 1, 38.)

He was not, however, bound to plant new trees for those overthrown by wind without his fault. (D. 7, 1, 59, pr.)

II. ALIENATION BY USUFRUCTUARY.—Strictly, the usufructuary could not alienate his interest; he could not make another person usufructuary; and perhaps at first a usufruct was absolutely inalienable. But in later times the usufructuary was entitled to give to another, in whole or in part, his right of enjoyment, provided that person enjoyed it in the name and on account of the usufructuary. (D. 7, 1, 38.) Diocletian and Maximian (A.D. 292) state it as a proposition clear in law, that the usufructuary could let or sell his usufruct (Vat. Frag. 41); and this, we are elsewhere informed, even against the wishes of the owner. (D. 7, 1, 67; D. 7, 1, 13, 2.) If the usufructuary made a gift of his usufruct, he lost it by nonuser if the donee did not use it. (D. 7, 1, 40.) But if the usufruct were sold, the price received was regarded as equivalent to user, and the usufructuary did not forfeit it by the default of the purchaser. (D. 7, 1, 39.)

Illustration.

An owner hires a farm from its usufructuary, and sells the farm to Seius without reserving the usufruct. Does the usufructuary still retain the usufruct in the name of Seius? No, not even if the owner continues to pay the rent; because Seius gathers the fruit as his own, not in the name of the usufructuary. The remedy of the usufructuary is an action against the owner for breach of contract. The same result follows if the owner lets the usufruct in his own name. But if another than the owner hires the usufruct, and lets it out, the usufruct still subsists. (D. 7, 4, 29.)

B. Duties of Usufructuary to the Owner = rights *in personam* of the owner.

1. The usufructuary must deal with the property as a *paterfamilias*. (J. 2, 1, 38.) The same idea is expressed by saying that the usufructuary must satisfy the judgment of a good man (*arbitratu viri boni*); a phrase which signifies that no very precise rule could be laid down, but that each case must be judged according to circumstances. (D. 7, 1, 9.) The standard of diligence required was at all events equal to the highest known to the Roman Law, and not the lower standard admitted in the case of co-owners. (D. 7, 9, 2; D. 7, 1, 65.) The usufructuary was compelled to cultivate the land in a husbandlike manner. He was bound to give the slaves food and clothes according to their condition and standing (D. 7, 1, 52, 2), and also medical attendance. (D. 7, 1, 45.)

2. The usufructuary was bound to do ordinary and moderate repairs, or surrender the usufruct. (D. 7, 1, 64.) If the roof of a house had decayed with age, the usufructuary was not bound to renew it; but if the owner put on a new roof, the usufructuary had a right to use it. (D. 7, 1, 7, 2.) All that the usufructuary could be asked to do was to keep the roof tight: if he spent more than he was obliged, he could demand the excess from the owner. (C. 3, 33, 7.)

3. The usufructuary must pay the burdens on the land, *e. g.*, *tributum* (land-tax paid to the Emperor); *stipendium* (land-tax paid to the *aerarium* of the people), (D. 7, 1, 52, pr.); *solarium* (annual payment for use of a public place); *indictio* (temporary tax on land), (D. 33, 2, 28); sewer-rate (*nomine cloacarii*); highway rate (*ad collationem viae*), &c. (D. 7, 1, 27, 4.)

c. Rights of Owner.

The rights of the owner are practically in abeyance during the continuance of the usufruct, and he must permit every form of enjoyment of the property that does not injure it. (D. 7, 1, 15, 6.) He cannot pull down any house on the land,

nor build upon it, without the concurrence of the usufructuary. (D. 7, 1, 7, 1.) He cannot surrender a servitude, but he can acquire one, without the consent of the usufructuary. (D. 7, 1, 58, 8.) He cannot impose a servitude on the land, even if the usufructuary is willing—a disability arising from the separation in law between the ownership and the enjoyment of land, and not required by the interests of the usufructuary. On the other hand, an owner could with, but not without, the sanction of the usufructuary, make a burial-place on the land. (D. 7, 1, 17.)

A question is raised by the editor of Mr. Austin's works (p. 856), whether the owner had a right of entry on the land subject to usufruct. The editor takes the affirmative, and quotes the text (D. 43, 19, 3, 5) concerning the interdict *de itinere actuque privato*. The passage states that in certain circumstances the owner had a right to the use of a servitude (*iter*) over neighbouring land, which he could assert as well against the usufructuary as against others. By implication, if the owner had a right to use a road leading from his own land, he could enter upon that land. But this passage refers to a road that both owner and usufructuary had used; and inasmuch as the interdict in question was open to one that had no right, but had only, in fact, used the road for thirty days during the year preceding the application for the interdict, all that is proved is, that as a matter of fact the owner had used the road. This being stated as a hypothetical fact in the first part of the passage, throws no light whatever on the question whether the owner had a *right* to the servitude. Also a former section (D. 43, 19, 3, 4) informs us that although the use of the servitude by the usufructuary kept it alive for the owner, yet this would not in the absence of actual use by the owner give him a right to the interdict. On the other hand, the use of the servitude by tenants or friends was held to be a use by the owner, and to entitle him to the interdict. While the passage from Ulpian (D. 43, 19, 3, 5) must be considered indecisive, if indeed § 4 does not raise a presumption the other way, there are other texts that introduce great difficulty into the question. Ulpian, speaking of *usus*, which, we shall see, is a much more restricted right than usufruct, says that one having the use of a farm can dwell upon it, and forbid the owner coming there. On the other hand, he must give access to the owner's tenant or his agricultural (but not his household) servants. (D. 7, 8, 10, 4.) In another passage (D. 7, 8, 12, pr.), Ulpian, still speaking of *usus*, says that the owner had a right of entry to gather the crops, and that he could even dwell on the land in harvest. If then an owner, entitled to the *fructus*, and deprived only of the use (*usus*), had no right of entry except for the purpose of preparing the ground and gathering the crops, it would seem to follow that, if he had no right to the *fructus*, he had no right of entry whatever. On the other hand, the owner had a right to see that the boundaries of the land were preserved, and for that purpose could send an *insularius* (slave employed to look after a house) to a house, or a *saltuarius* (person employed to watch lands or forests) into the farm or estate. (D. 7, 8, 16, 1.) It would seem, therefore, that the owner had a right of entry so far as to see that his property was not diminished, but whether for other purposes is not at all made out.

INVESTITIVE FACTS.

A. Modes of Creating Usufruct.

The usufruct, being a fragment of full ownership, might be created in two ways. The owner might give away the usu-

fruct, reserving only the naked ownership (*nuda proprietas*); or he might give away the naked ownership, reserving a usufruct for himself. The former was called *datio* (*dare usumfructum*); the latter *deductio* (*deducto usufructu*). A third course was open: he might give away, at the same time, the usufruct to one person and the naked ownership to another. All these are exemplified in the first mode.

I. LEGACY.—Usufruct admits of being separated from ownership, and this happens in many ways. If, for instance, it is left as a legacy, then the heir has the bare ownership, the legatee the usufruct. If, on the contrary, the farm is left as a legacy but the usufruct withheld, then the legatee has the bare ownership, the heir the usufruct. And again, the testator may leave one the usufruct, and another the farm without the usufruct. (J. 2, 4, 1.)

Following the plan hitherto pursued, we shall abstain from dwelling on this point until we come to the subject of legacy.

II. MANCIPATION.—Our saying that usufruct admits of *in jure cessio* only was not too hasty. For although a usufruct may be established by *mancipatio*, inasmuch as it can be withdrawn when the property is conveyed, yet it is not the usufruct itself that is conveyed. For it is only withheld in conveying the property, so that one has the usufruct, another the property. (G. 2, 33.)

Paul observes that by mancipation a usufruct could only be reserved (*deducto*), not transferred. By mancipation the ownership could be transferred, reserving a usufruct. (Vat. Frag. 47.)

III. IN JURE CESSIO.—Usufruct admits of *in jure cessio* only. For the owner can thus transfer the usufruct to another, while he himself keeps the bare ownership. (G. 2, 30.) But this of course is so in the case of Italian lands, because those lands admit of *mancipatio* and *in jure cessio*. (G. 2, 31.)

Still, since usufruct can be established both in man and in all other animals, we ought to know that usufruct in those can be established even in the provinces by *in jure cessio*. (G. 2, 32.)

In jure cessio was the mode of creating and transferring incorporeal things by act *inter vivos*. By *in jure cessio* an owner could transfer the usufruct, reserving only the naked ownership (*dare usumfructum*), as well as give the naked ownership, reserving a usufruct (*deducto usufructu*). (Vat. Frag. 47.) Gaius observes that lands in the provinces could not be conveyed by *in jure cessio*; but moveable *res Mancipi* (slaves and quadrupeds) could be conveyed in the provinces by that mode as at Rome. The reason was that land was a *res Mancipi* only in Italy, while moveables, if *res Mancipi* at Rome, retained that character everywhere.

IV. CONTRACT (in the Provinces).—But on landed estates in the provinces, if a man wishes to establish a usufruct, or a right of passage on foot or with beasts, or of bringing water, or of raising a house higher, or not raising it lest a neighbour's lights be obstructed, and the like rights, he can do so by agreements and stipulations. For even the landed estates themselves do not admit of *mancipatio* or *in jure cessio*. (G. 2, 31.)

But if a man wishes to establish a usufruct otherwise than by will, he ought to do so by agreements (*pacta*) and stipulations. (J. 2, 4, 1.)

Pacts and stipulations will* be explained, in the proper place, under the head of Contract.

This is an instance of rights *in rem* being created by the agreement of the parties and nothing more; that is, by contract simply. In dealing with *dominium* a careful distinction had to be kept in view between contract and the investitive facts of *dominium*, because in every instance the Roman Law required something more than contract to create ownership. There was no reason in the nature of things why rights *in rem* should not be created by contract; but the Roman legislators, for reasons satisfactory to themselves, chose to require something beyond the assent of the parties in order to transfer ownership. That something more was delivery, a fact that accomplished one important end of the lawgiver—making the ownership notorious. But when the ownership was split up, and it was desired to give a man the usufruct, a difficulty arose; because if delivery were made, the transaction would assume the appearance of a change of ownership, and thus imperil the naked ownership of the donor; and, moreover, as we shall see presently, it would be unsuitable when the usufruct was conditional. Accordingly, in the old civil law, the cumbrous fiction of a lawsuit was adopted in the case of incorporeal things. When the ancient modes of conveyance fell into disuse, there was no ceremony known to the law that could conveniently take their place, and hence incorporeal property came to be created and transferred by mere agreement of the parties. This change appears in Gaius; but he confines it to provincial lands (which were *res nec mancipi*); when, however, we come to Justinian, the old conveyances were obsolete, and the proper mode of creating a usufruct in his day was by pact and stipulation. Justinian, therefore, makes no mention of *mancipatio* and *in jure cessio*.

B. Conditional Usufructs.

Paul says (Vat. Frag. 50, 48) that a usufruct may be created to begin at once, and to terminate at a fixed period prior to the death of the usufructuary, but that it cannot be made to commence at a future day (Vat. Frag. 49); and this, he adds, was an infirmity that it shared in common with all those rights that could be enforced only by the old *legis actiones*. The same pas-

sage occurs in the Digest (D. 7, 1, 4, 1), where Paul still stands sponsor, but the voice of Tribonian speaks. In the Digest it is said that a usufruct may commence at a future day. It was also finally established that a usufruct might begin from an uncertain event (*ex conditione*), or be terminated by any event (*ad conditionem*). (D. 7, 1, 51; D. 7, 1, 54.)

Illustration.

Titius, whose farm was subject to a usufruct, bequeathed a usufruct of it to Semprius. Was the legacy valid, seeing that a usufruct already existed? Maecianus said it was, even if the previous usufructuary survived Titius, and enjoyed the usufruct after the heirs of Titius had taken possession. (D. 7, 1, 72.)

c. Securities.

The various modes of creating usufructs just described operate in favour of the usufructuary only when he has complied with an indispensable preliminary. (D. 7, 9, 13; D. 7, 9, 7.) Every usufructuary must give security, whatever the mode of his appointment. (D. 7, 9, 9, 1.) The form of security was sureties (*fidejussores*).[†] (C. 3, 33, 4.) The object of the security was twofold,—(1) that the usufructuary would deal with the property so as to satisfy a fair man (*boni viri arbitratu*); and (2) would give back the property when his interest terminated. (D. 7, 9, 1, pr.) In later times these promises were superfluous; the law imposed these obligations upon all usufructuaries: but there was an advantage in getting others as sureties, and for mismanagement an action could be brought on the promise before the usufruct came to an end. (D. 7, 9, 1, 5.)

DIVESTITIVE FACTS.

But lest the properties should become altogether useless by being always separated from the usufruct, it is held that in certain fixed ways the usufruct disappears, and falls back into the ownership. (J. 2, 4, 1.)

When the usufruct comes to an end, it falls back into the property, and from that time forward the owner of the bare property-rights comes to have full power over their object. (J. 2, 4, 4.)

I. *In jure cessio*.—The man that has the usufruct can, by making an *in jure cessio* to the owner, detach the usufruct from himself and merge it in the property. (G. 2, 30.)

And again, a usufruct disappears if yielded up to the owner by him that has it. (J. 2, 4, 3.)

II. Merger. (*Consolidatio*, or *comparatio dominii*).—Or, on the contrary, if he that has the usufruct acquires the ownership. This is called merger (*consolidatio*). (J. 2, 4, 3.)

III. And by not using it (*non utendo*) in the proper way and time,—all these points are settled by our constitution. (J. 2, 4, 3.)

A usufructuary that neither by himself, nor by any one in his name, availed himself of his usufruct, while the period of *usucapio* elapsed, anciently lost his rights. (Paul, Sent. 3, 6, 30.) It made no difference that the usufructuary was ejected by force from his land. (D. 43, 16, 10.) Justinian preserved the rule, but altered the time in accordance with his changes of the period of prescription. (C. 3, 33, 16, 1; C. 3, 34, 13.) The question naturally occurs,—How is a usufruct lost by lapse of time, when it cannot be gained in that way? The answer is easy. A usufruct is regarded as simply a burden upon the ownership, and by *usucapio* the owner gets rid of the burden. It is thus, so to speak, the ownership that is regained by *usucapio* (*usucapio libertatis*), rather than the usufruct that is lost.

IV. The expiration of the period for which the usufruct was granted. This never exceeded the life of the usufructuary, or, in the case, of a municipality obtaining a usufruct, 100 years, the supposed duration of the longest life. (D. 33, 2, 8; D. 7, 4, 3, 3; C. 3, 33, 3.) But it might be terminated sooner, either by a time having been fixed in the creation of the usufruct, or some event designated which was to terminate its existence. (Paul, Sent. 3, 6, 33; D. 33, 2, 30; C. 3, 33, 5.)

Illustrations.

A usufruct is granted to A until B shall attain the age of 21. Suppose B died before reaching that age, is the usufruct at an end? Justinian decided that it should not, but should last for the period mentioned, if A lived so long. (C. 3, 33, 12, pr.)

A grant of a usufruct to A until B shall recover his sanity. In this case the recovery of B destroys the usufruct; otherwise it endures until B dies, if A so long lives. (C. 3, 33, 12, 1.)

V. A usufruct comes to an end, too, by the death of him that has it, or by his undergoing one of two forms of *capitis deminutio*, the *maxima* or the *media*. (J. 2, 4, 3.)

This was the law as settled by Justinian; but previous to his time even the smallest change of status, as by adoption or arrogation, was fatal. (Paul, Sent. 3, 6, 29.)

VI. Analogous to this was a singular mode of losing usufructs, of which the sting was also taken out by Justinian. According to the rule that a slave can acquire for his master only, not for himself, a slave might become the medium of conveying a usufruct to his master. If afterwards the master sold the slave, the usufruct was extinguished. We have spoken of the slave as a conduit-pipe conveying rights to his master. We may now vary the figure, and speak of him as a chain by which the usufruct was anchored in his master's possession. (D. 7, 4, 5, 1.) Justinian enacted that usufructs should not be destroyed by the death, manumission, or alienation of the slaves by whom they were acquired. The same rule was applied to

acquisitions through a son under the *potestas*; and Justinian, making a deeper change, decided that even if the father died or lost his liberty the usufruct should not be lost, but should survive to the son—for whom, indeed, it must have been from the first intended. (C. 3, 33, 17.)

VII. Destruction or alteration of the essential character of the property. *Interitus* or *mutatio rei*.

Nay, further, it is agreed that if a house is consumed by fire, or falls in either by earthquake or by its own defects, the usufruct is extinguished, nor can any be claimed even in the site. (J. 2, 4, 3.)

For it is a right over an external object; take away that, and the usufruct itself must needs be taken away. (J. 2, 4, pr.)

Illustrations.

The owner builds on ground subject to the usufruct. This so alters the character of the place that the usufruct is gone, and the usufructuary is left to his action for damages. (D. 7, 4, 5, 3.)

Usufruct of a pond. The pond dries up. The usufruct is extinguished. (D. 7, 4, 10, 3.)

Legacy of a wood. The trees are cut down, and the land sown. The usufruct is at an end. ((D. 7, 4, 10, 4.)

A gift of usufruct of silver. It is made into a vase. The usufruct is at an end. (D. 7, 4, 10, 5.)

VIII. By original defectibility of title. If the estate of the donor was liable to be destroyed by a cause prior to the usufruct, and it so perishes, the usufruct is also extinguished. (D. 7, 4, 19.)

Illustration.

A testator leaves a usufruct of a farm to a legatee when a certain condition is fulfilled. Before that time the testator dies, and the heir gives a usufruct of the same land to another. Afterwards the condition is fulfilled; the second usufruct is at once terminated. (D. 7, 4, 16.)

TRANSVESTITIVE FACTS.

But if the man that has the usufruct yields it by *in jure cessio* to a stranger, he still keeps his rights none the less, for the process is inoperative. (J. 2, 4, 3; G. 2, 30.)

The same rule prevailed with Justinian, in whose time pacts and stipulations had taken the place of the *in jure cessio*. But, as has been already explained, the prohibition was more technical than real; because the right of the usufructuary to part with the whole of his enjoyment of the land, with or without a price, was incontestable. Still, in strictness, we must say that there was no transvestitive fact.

REMEDIES.

A. Rights and Duties.

I. Use and enjoyment. The usufructuary had the same remedies as the owner;

as, e.g., the *actio legis Aquiliae* against the owner as well as all the world (D. 9, 2, 12); *utilis actio aquae pluviae arcendae* (D. 39, 3, 22); the *actio furti* (D. 47, 2, 46, 1); *actio vi bonorum raptorum* (D. 47, 8, 2, 23); *interdict de arboribus caedendis* (D. 43, 27, 1, 4); *interdict de vi et vi armata* (D. 43, 16, 3, 13); *interdict quod vi aut clam*. (D. 43, 24, 12.) Generally, in so far as the usufructuary had rights to the enjoyment of the property as against the owner and all other men, he could use the same actions and interdicts as the owner.

II. Duties of usufructuary to owner. The owner (*dominus*) may sue the sureties of the usufructuary, and has against the usufructuary the same remedy as against other persons. Thus, for misconduct to slaves he may have the *actio servi corrupti*, *actio injuriarum*, or *actio legis Aquiliae*. (D. 7, 1, 66.)

B. Investitive Facts.

I. *Actio confessoria de usufructu*.—This was the action by which a usufructuary could establish his usufruct against the owner or any possessor. (D. 7, 6, 5, pr.) It was also the proper action against the owner of adjoining land if he interfered with the enjoyment of a servitude to which his land was subject in favour of the usufructuary land. Servitudes were attached to the *dominium*, and it was considered a difficulty that a usufructuary, as such, should be entitled to a servitude. The way in which it was accomplished was not by claiming the servitude, but by affirming that the owner of the adjoining land interfered with the enjoyment by the usufructuary of his land. (D. 7, 6, 1. pr.)

The burden of proof rests upon the usufructuary; and if he succeeds he gets a judgment substantially the same as in a *vindicatio*. The judge will order the possessor to give up the land; if he refuses wilfully, or has disabled himself from obeying the judgment, then to pay such a sum as the plaintiff has sworn is the value of the usufruct; if he is unable, through his own carelessness only, not through fraud, then the value of the usufruct is to be settled by the judge. (D. 7, 6, 5, 3.)

c. Divestitive Facts.

I. *Actio Negatoria de Usufructu*.—This is the corresponding action by which the owner may establish the freedom of his property from a usufruct, and, if he is not in possession, recover the crops that the possessor has gathered. (D. 7, 6, 5, 6.)

U S U S.

DEFINITION.—Use (*usus*) is a usufruct without the produce (*fructus*), (D. 7, 8, 1, 1; D. 7, 8, 14, 1); and is confined to the personal wants of the usuary (*usuarius*). The exact difference between use and usufruct appears in considering the rights and duties of the usuary.

RIGHTS AND DUTIES.

A. Rights of the Usuary.

I. Use and enjoyment.

1. Fewer rights are implied in use than in usufruct. For he that has the bare use of a farm is understood to have nothing beyond the use, for his daily needs, of the vegetables, fruits, flowers, hay, straw, timber. And he may stay on that farm only so long as he is not an annoyance to the owner, or a hindrance to those that carry on the farm work. (J. 2, 5, 1.)

In addition to dwelling on the land, the usuary has, within the limits mentioned by

Justinian, the right of walking or driving on the land. There was considerable diversity of opinion as to the exact effect of a grant of the use of land. Sabinus and Cassius said the usufruct might take wood for ordinary consumption, and the apples, vegetables, and flowers. Nerva added the use of the straw, but not the oil, grain, or fruits. Proculus and Labeo went further. They said he could take the produce of the farm for the maintenance of himself and family, and even for his guests and friends. Ulpian favoured this view as more in harmony with the motives of the donor of the use. (D. 7, 8, 12, 1.) Paul adds that he might take provisions for the year's use, but only in the country; and that he could carry any apples, flowers, or firewood to his town residence. (D. 7, 8, 15.)

2. Again, he that has the use of a house is understood to have rights up to this point only;—he may dwell in the house himself, but he cannot transfer this right to another; and it is scarcely quite admitted that he may receive a guest. But he may dwell there with his wife and children, as well as his freedmen and other free persons that he employs no less than his slaves. And similarly, if it is a woman that has the use of the house, she may dwell there with her husband. (J. 2, 5, 2.)

Although there seems to have been some doubt whether a woman had the same extent of use of a house, yet ultimately it was held that the rights were the same for men and women (D. 7, 8, 6), provided the guests were such as could with a regard to propriety dwell with the women. (D. 7, 8, 7; D. 7, 8, 4, 1; D. 7, 4, 22.)

3. And again, he that has the use of a slave can use his labour and service only in person. But he is not allowed to transfer his rights to another in any way. (J. 2, 5, 3.)

4. The same rule applies to beasts. (J. 2, 5, 3.)

But if it is the use of cattle or of sheep that is left as a legacy, he that has the use can use neither the milk nor the lambs, nor the wool, for all those are reckoned among fruits, but only the cattle to manure his fields. (J. 2, 5, 4.)

II. Powers of alienation.

And he cannot allow another the rights he has, either by selling them or letting them out, or by giving them for nothing; whereas he that has the usufruct can do all these. (J. 2, 5, 1.)

B. Duties of the Usuary. The usuary was not, as a rule, bound to repair, but only to share the expense of repairs with the owner. If, however, the property gave no *fructus*, and only the use of it could exist, the usuary was bound to repair to the same extent as a usufructuary. (D. 7, 8, 18.) The usuary also was forbidden to change the character of the property, even to improve it. (D. 7, 8, 23.)

INVESTITIVE FACTS AND DIVESTITIVE FACTS.

In the very same ways in which the usufruct is established, the bare use is commonly established too. And it comes to an end in those very same ways in which the usufruct also ceases. (J. 2, 5, pr.)

Security is required, as in the case of the usufructuary.

The REMEDIES are precisely similar to those in the case of usufruct.

HABITATIO.

DEFINITION.—Papinian observes that the right of habitation is scarcely to be distinguished from the right of using a house. (D. 7, 8, 10, pr.) Anciently it was supposed to be a grant for one year only, but it was ultimately put on the same footing as usufruct—namely, for life. (D. 7, 8, 10, 3.)

But if *habitatio* is left as a legacy to any one, or is established in any way, it seems to be neither use nor usufruct, but as it were a special right. Those that have this right for their benefit, we have allowed by our published decision, in accordance with Marcellus' opinion, not only to live in the place themselves, but to let out the right to others. (J. 2, 5, 5.)

Another characteristic is that it was not lost through *non-user* or *capitis minutio*. (D. 7, 8, 10, pr.)

OPERAE SERVORUM.

This also is scarcely distinguishable from the use of slaves. Like *habitatio*, it was not lost by non-user (D. 33, 2, 2) or *capitis minutio*. (D. 7, 7, 2.)

PRECARIUM.

DEFINITION.—Precarium is a tenancy-at-will of land, or of a servitude (D. 43, 26, 15, 2), or of a moveable. (D. 43, 26, 4, pr.; D. 43, 26, 1, pr.) The person to whom a thing was given, *precario*, was entitled to the use and enjoyment of it so long as the owner pleased, but no longer. (D. 43, 26, 12.)

RIGHTS OF TENANT.—The tenant of land was a *possessor*, and as such was protected from all persons, except the owner, in the use and enjoyment of it. (D. 43, 26, 15, 4.) As in the case of the usufructuary, he could not claim the offspring of female slaves. (D. 43, 26, 10.)

DUTIES OF TENANT.—(1.) To retain possession until it is asked back by the owner, and then to give it up. (D. 43, 26, 8, 3.) (2.) To answer for wilful mischief done to the property while in his possession, but not for negligence (*culpa*). Thus if he lost a servitude attached to the land by non-use, he was not bound to give compensation, unless he wilfully abstained from using it. (D. 43, 26, 8, 5.)

INVESTITIVE FACTS.—All that was required was the possession of the thing with the consent of the owner. (D. 43, 26, 9; D. 43, 26, 2, 3.)

DIVESTITIVE FACTS.—(1.) By the lapse of the time for which the agreement was made, if any time was mentioned. (D. 43, 26, 5.) (2.) By the happening of an event on the occurrence of which it was to be revoked. Thus, if on a sale of land the buyer was allowed to enter as a tenant-at-will until the price should be fully paid, and the buyer failed to pay at the time agreed upon, the seller could revoke the tenancy and turn out the buyer. (D. 43, 26, 20.) (3.) The death of the tenant, but not necessarily of the owner, put an end to the tenancy. (D. 43, 26, 12, 1; D. 43, 26, 8, 1.)

REMEDIES.—A. The tenant's remedies against third parties were the interdicts and actions open to *ab ona fide* possessor.

B. For rights of owner. I. Interdict *de precario*.

(1.) This interdict was restitutory—to compel the tenant to give back possession to the owner. (D. 43, 26, 4, 2.)

(2.) It was not limited by a year's prescription. (D. 43, 26, 8, 7.)

II. Also an *actio in factum praescriptis verbis* or *condictio incerti* might be brought by the owner for the same purpose. (D. 43, 26, 2, 2; D. 43, 26, 19, 2.) For the meaning of this form of action see Book II., Div. I., Subdiv. I., Equitable Contracts.

III.—PRAEDIAL SERVITUDES;

OR, DEFINITE RIGHTS *IN REM* TO THINGS.

DEFINITION.

A praedial servitude may be defined as a definite right of enjoyment of one man's land by the owner of adjoining land; including in the term "land" also houses. The land subject to this right is called *praedium serviens*, and the land to which the right is attached is called *praedium dominans*.

These servitudes are called praedial, because they cannot exist without estates (*praedia*). For no one can acquire a praedial servitude in town or country unless he has estates; nor yet become subject to one unless he has estates. (J. 2, 3, 3.)

The lands must be adjoining each other (*vicina praedia*). (D. 8, 3, 5, 1.) The exact degree of proximity, however, is regulated by the nature of the particular servitude.

Illustrations.

A servitude, the object of which is to restrict a neighbour from adding to the height of his house, is valid, although there is a house between; because so long as the intermediate house is not built higher the servitude is effective. (D. 8, 5, 4, 8; D. 8, 5, 5; D. 8, 2, 36; D. 8, 2, 38.)

A waggon road (*via*) is good as a servitude, although it is interrupted by a river, if there is a ford or bridge. (D. 8, 3, 38.)

A right of drawing water (*aquae haustus*) may exist, although between the servient and dominant land there lies a public road or river. (D. 39, 3, 17, 2.) But a right of leading water (*aquae ductus*) could not exist unless all the land through which the water flowed was subject to the servitude. (D. 8, 3, 7, 1.)

A praedial servitude is attached to the land in this sense, that it cannot be transferred by the owner of the dominant land to the owner of any other land. Until extinguished in one of the ways hereafter enumerated, a servitude passes with the land to every possessor. (D. 8, 4, 12; D. 8, 5, 20, 1.)

Praedial servitudes are restricted in their enjoyment to the land to which they are attached. Labeo thought that an owner of land having a right to lead water from other land (*aquae ductus*), could allow the owners of neighbouring lands to enjoy it as well. But the opinion of Proculus prevailed, that only as much could be taken as was required for the farm to which the right of water attached. (D. 8, 3, 24.) Similarly, if to a farm is attached the right of taking sand or lime from other land, no more can be taken than is wanted for that farm. (D. 8, 3, 5, 1.)

Illustration.

The owner of two adjoining properties sold the upper one, making it a condition of sale that the buyer should have permission to make a ditch to pass on water from the higher land. The buyer received water from still higher lands, and wished to pass it through his ditch to the lower ground. Could he do so? No; he cannot send down more than is necessary to dry his own land. (D. 8, 3, 29.)

All praedial servitudes ought to be capable of enduring as long as the land to which they are attached. Hence, strictly, water can be led only from a fountain, or other permanent source (D. 8, 3, 9); not from a pond that is liable to dry up (*stagnum*), or even a pond that does not dry up (*lacus*). (D. 8, 2, 28, pr.) But by a rescript of the Emperor Antoninus it was held that a right to water might exist even from an artificial reservoir. (D. 8, 4, 2, pr.; D. 8, 3, 9, pr.)

A praedial servitude is indivisible; it must be enjoyed wholly or not at all. (D. 8, 1, 11.)

Illustrations:

If a person to whom a servitude belongs dies, each of his several heirs has a right to the servitude. (D. 8, 1, 17.)

A person alienating part of an estate cannot impose a servitude on the whole of it, but he may on the part alienated. (D. 8, 4, 6, 1.)

If the owner of a servitude acquires only a part of the land burdened with the servitude, or the owner of the land burdened acquires only a portion of the dominant land, the servitude is not extinguished, although it could not have been so created. (D. 8, 1, 8, 1; D. 50, 17, 85, 1)

URBAN AND RURAL SERVITUDES.

What is a *praedium rusticum* or *praedium urbanum*? For the purpose of the law of servitudes the distinction seems to be drawn thus:—Land in the country is used chiefly for agriculture, and for building only as subservient to agriculture; land in towns is used chiefly for building, and for cultivation only as an accessory of building. Hence a servitude that affects chiefly or only the soil, and could exist if no houses were built, is called a rural servitude (*jus rusticorum praediorum*); and a servitude that affects chiefly or only houses, and could not exist without houses, although it may also affect the soil, is an urban servitude (*jus urbanorum praediorum*).¹ Hence an urban servitude may exist wholly in the country, and a rural servitude wholly in the town. A right to rest a beam or joist on a neighbour's wall (*jus tigni immittendi*) is an urban servitude, although it be in the country; and a right of way to a house is a rural servitude, although it be in a town. The importance of the distinction is centred in two points, one of which, however, is only of antiquarian interest. Urban servitudes were *res nec Mancipi*; rural servitudes in Italy were *res Mancipi*. Another difference more lasting will appear when the nature of these servitudes is more particularly considered. Urban servitudes are all, or nearly all, *negative*; rural servitudes are all, or nearly all, *positive*. This makes a difference in regard to the loss of the servitude by non-use. A negative servitude can be lost only by an adverse act of the owner of the land that owes the servitude; the servitude consisting in his not doing such act. An affirmative servitude must be kept alive by the acts of the person entitled to it, and is lost by abstinence from such acts. But this point must be again referred to.

¹ *Servitutes praediorum aliae in solo, aliae in superficie consistunt.* (D. 8, 1, 3, pr.)

RIGHTS.

An account of the rights of which servitudes consist is simply an enumeration and statement of the various servitudes.

(A.) Rural Servitudes (*servitutes rusticorum praediorum*).

Over country estates the rights are these :—*iter, actus, via, aquae ductus*. (J. 2, 3, pr.)

Among the servitudes over country lands some think we may rightly reckon the right of drawing water, of driving cattle to water, of grazing, of burning lime, of digging sand. (J. 2, 3, 2.)

I. Rights of way. 1. *Iter*; 2. *Actus*; 3. *Via*.

Iter is the right to pass,—for a man that is to walk; not to drive a beast or a carriage. *Actus* is the right to drive either a beast or a carriage. Therefore he that has *iter* has not *actus*; but he that has *actus* has *iter* also, and can use the road even when he is not driving a beast. *Via* is the right to pass whether driving or walking; for *via* includes both *iter* and *actus*. (J. 2, 3, pr.)

In the absence of such a servitude, no one had a right to walk or pass over another's land. (C. 3, 34, 11.)

The most extensive right of way (*via*) included the right of drawing stones and wood, and heavy-laden waggons. By the law of the XII Tables, the road must be 8 feet in width and 16 feet at the turnings (D. 8, 3, 8); unless the parties agreed upon any other width. (D. 8, 3, 13, 2.) If, however, the road as agreed upon was not of sufficient width, although it was called *via*, it was held to be either *iter* or *actus* according to its dimensions. (D. 8, 1, 13.)

4. A right of passing over (*jus navigandi*) a permanent lake belonging to another person to one's own land or house, was a recognised servitude, analogous to a right of way. (D. 8, 3, 23, 1.)

II. Rights to water.

1. Leading water (*aquae ductus*).

Aquae ductus is the right of leading water through another's land. (J. 2, 3, pr.)

This servitude could be established only when there was an existing and known supply of water, although Labeo thought that a servitude might be created to search for water. (D. 8, 5, 21.) The owner of the servient land could not keep back the water, nor refuse permission to make the necessary constructions for leading it off. (C. 3, 34, 10.) As a rule the

water must be led off in pipes (*fistulae*); but by special agreement stone channels might be allowed. (D. 39, 3, 17, 1.)

The quantity of water that could be taken was determined, in the absence of agreement, by custom, not by the wants of the land for which the servitude was granted (C. 3, 34, 12); but so much could not be taken as to starve the land from which it came. (C. 3, 34, 6.) If custom sanctioned it, the water might be used for irrigation. (C. 3, 34, 7.)

If, at the granting of the servitude, no special track were marked out for the pipes, the owner of the servitude could select his own course (D. 8, 3, 21); but having done so, he could not of his own motion alter it. (D. 8, 1, 9.)

The owner of the servitude had a right also to cleanse and repair the aqueduct. (D. 43, 21, 1, pr.)

The water may be either perpetual (*aqua cottidiana*), or used only in summer (*aqua aestiva*). (D. 43, 20, 1, pr.; D. 43, 20, 1, 29.)

2. Drawing water from a well or fountain (*aquae haustus*). This is a right to go upon another's land, and draw water from his fountain. The right to keep the fountain in repair was included. (D. 43, 22, 1, 6.) In reference to this servitude, an example may be quoted to show that it need not be praedial; and the question whether it was so or not must be determined by the terms of the grant. The presumption was that it was a praedial servitude. (D. 8, 3, 20, 3.)

"Lucius Titius to Gaius Seius, his brother, greeting. From the water flowing into the fountain that my father constructed on the isthmus, I grant and concede to you gratuitously a rill, to be led either into the house you hold in the isthmus, or wherever you please." This was held to be a personal grant, and not to go to the heirs of Gaius Seius, or the purchasers of the house on the isthmus. (D. 8, 3, 37.)

3. Watering one's cattle on another's land (*pecoris ad aquam appulsus*). This, of course, includes the right of leading the cattle on to the servient land (*actus*). In this case, again, the question was one of intention; whether the privilege was confined to the individual to whom it was given, or was attached to his land, so as to go to his heirs or a purchaser of the land. (D. 8, 3, 4.)

4. A right of passing on water—the converse of *aquae ductus*—*aquae educendae*. (D. 8, 3, 29; D. 8, 5, 8, 5.)

III. Right of pasture (*jus pascendi*).

This was a right to put one's cattle to pasture on another's

land. It might be either praedial or personal, like the right of drawing water. (D. 8, 3, 4.)

Illustration.

Several owners of separate lands bought a right of pasture on pasture-land. This right was enjoyed by several of their successors; and finally some of them sold their lands. Had the purchasers the right of pasture? in other words, was the servitude praedial? Yes, if there was no agreement to the contrary. This seemed the proper inference to be drawn from all the facts. (D. 8, 5, 20, 1.)

This right must be carefully distinguished from *compascuus ager*, which is land belonging to a number of owners for the purpose of joint pasture.

IV. Other praedial servitudes.

The instances that have been given were the most common examples of praedial servitudes; but there were many others, which need only be referred to:—1. A right of quarrying stones for the use of one's land from the land of another (*jus lapidis eximendae*). (D. 8, 4, 13, 1.) 2. A right of digging for sand (*jus arenae fodiendae*) or chalk (*cretae eximendae*). 3. A right of burning lime (*jus calcis coquendae*). 4. A right of cutting *silva caedua* for stakes to vines. (D. 8, 3, 6, 1.)

(B.) Urban Servitudes (*jura urbanorum praediorum*).

Over town estates the servitudes all attach to buildings. And indeed they are called servitudes over town estates because all buildings are called town estates, even country houses. Now the servitudes over town estates are these: the servitude of supporting the weight of a neighbour's house; of allowing a neighbour to run a beam into one's wall; of receiving or not receiving the raindrops or the water that flows from a neighbour's house into one's own house or yard; and of hindering a man from raising his house too high so as to obstruct a neighbour's lights. (J. 2, 3, 1.)

1. The servitude of support to a building (*oneris ferendi*). This servitude exists when one house rests upon a wall or pillars belonging to another. This is the only case where the duty of repairing was thrown upon the owner of the servient land. (D. 8, 2, 33.)

2. The servitude of supporting a beam or joist (*tigni immitendi*). This is simply inserting beams in the wall of another's house for the purpose of a covering to a walk alongside the wall, or for additional security. It may be established either with reference to existing beams or future constructions. (D. 8, 5, 14, pr.) The owner of the wall cannot be compelled to maintain it in repair. (D. 8, 5, 8, 2.)

3. *Stillicidii vel fluminis recipiendi vel non recipiendi*. *Stillicidium* is the dropping of water from the tiles of a house; *flumen* is when it is collected and passed on by a gutter. In regard to this water two different rights may exist under different circumstances. The adjoining land may be in want of water for irrigation or the like, and may secure a right to the supply of the rain water from a neighbour's house; or the owner of a house may wish to get rid of the water that falls on his house. The servitude of receiving the water (*stillicidii recipiendi*) forbids the owner of the servient land from building so high as to interfere with the due reception of the rain water. On the other hand, the house from which the rain falls may be the servient land, and a servitude may exist compelling the owner of it to allow the water to pass on to a neighbour's land. (D. 8, 2, 20, 3; D. 8, 2, 20, 6; D. 8, 2, 41, 1; D. 8, 2, 21.)

4. The servitude *altius non tollendi* prevents a house being increased in height. (D. 8, 2, 12.) This is easily understood, but another servitude, *altius tollendi*, has given great trouble to the commentators. Every owner had a right to build as high as he pleased, although he thereby shut up his neighbour. (D. 8, 2, 9; C. 3, 34, 8; C. 3, 34, 9.) Where, then, is the room for a servitude or special grant by which an owner should be able to exercise that right? One suggestion is, that a local custom might prevent houses being built beyond a certain height. Thus Augustus enacted that at Rome houses should not exceed 60 feet, and Nero passed a similar law. Severus and Antoninus, in speaking of the building of a bath, say it must not exceed the customary height. (C. 8, 10, 1.) But if by a local or general law houses were restricted to a certain height, it is difficult to see how a dispensation from such a law could be given by one proprietor to another, and such a dispensation the right *altius tollendi* would be.

5. Lights and prospect (*lumina, prospectus*). In the exercise of his right of building on his own land, one might shut out the light or view of his neighbour. To prevent this, a servitude, the object of which was to prevent such a building, might be created (*ne luminibus officiatur, et ne prospectui offendatur*). (D. 8, 2, 15; D. 8, 2, 4.) This servitude prohibited the shutting out of light by trees as well as by buildings. (D. 8, 2, 17, 1.) It applies not only to existing windows, but to those made subsequently to the creation of the servitude. (D. 8, 2, 23.)

Lumen is free vision to the sky, *prospectus* is free vision over lower grounds. (D. 8, 2, 16.)

Another kind of right existed that has been the subject of dispute—the right to open windows in a wall where otherwise it would be forbidden. (D. 8, 2, 4.) It is to this that the rescript of Antoninus and Verus refers, which says that when a servitude of lights (*lumina*) exists, the owner can build, leaving the customary space between the erection and the next house. (D. 8, 2, 14.)

6. Right of occupying space above another's land (*jus projiciendi* and *protegenti*). The rule of law was, that to the owner of the soil belonged all the space above the soil, and therefore anything overhanging from a neighbour's house above his land would be, in the absence of a servitude, an infringement of his rights. The projections here referred to are balconies (*maeniana*) and the eaves of houses (*suggrunda*), which do not rest on the wall of the neighbouring proprietor, but simply overhang his ground. The right to have such projections constituted the *jus projiciendi*. (D. 50, 16, 242; 1.) *Protectum* (hence *jus protegenti*) is something projected to cover a wall. (D. 9, 3, 5, 6.)

7. *Cloacae mittendae*, the right of passing a sewer through or below another's ground. The owner of the sewer had the right to cleanse or repair the sewer. (D. 43, 23, 1, pr.)

INVESTITIVE FACTS.

A. Modes of Creating Servitudes.

Gaius says that servitudes (*praedial*) are acquired in the same way as usufruct. (D. 8, 1, 5.)

1. Rights over urban estates can be created by *in jure cessio* only; over country estates by *mancipatio* also. (G. 2, 29.)

2. *Usucapio*. In the first place, it is alleged that incorporeal things cannot be acquired by *usucapio*, because they do not admit of physical possession. (D. 41, 1, 43, 1.) But Cicero speaks of the *usucapio* of *aquae ductus, iter, actus*, &c. A law, however, passed perhaps in the time of Tiberius (*lex Scribonia*), abolished *usucapio* of incorporeal things, unless simply as appurtenances of land so acquired. (D. 41, 3, 10, 1.) The extinction of servitudes by non-use was not, however, taken away by this law. (D. 41, 3, 4, 29.)

3. Prescription. There is no question, however, that in the time of Justinian at least servitudes could be acquired by

prescription in the same way as immoveable property. (C. 7, 33, 12.) In the Digest, several passages state that long possession (*bona fide*) gave a good title (D. 8, 5, 10; D. 39, 3, 26; C. 3, 34, 1; C. 3, 34, 2); so also immemorial possession without good faith. (D. 43, 20, 3, 4.) While there can be no doubt that servitudes could be acquired by prescription, it is not so clear what the time was; but, at any rate, after Justinian it may be assumed that servitudes were subject to the same rules as immoveables. •

4. Delivery of possession, reserving a servitude. The owner of two houses, in delivering one to a purchaser, may make it a condition of sale that the unsold house shall have a servitude as against the house sold, or may give a servitude to the house sold against the house not sold. (D. 8, 2, 34; D. 8, 4, 6.) By express agreement, any proper servitude can be reserved (*recipere servitutum*). (D. 8, 4, 10.)

5. If any one wishes to establish any such right for his neighbour, he ought to accomplish it by agreements and stipulations. (J. 2, 3, 4.)

As regards negative servitudes, which consist merely in a prohibition of an owner doing something he had a right as owner to do, there could be nothing beyond the mere agreement after the old forms of *mancipatio* and *cessio in jure* fell into desuetude. But in the case of a right-of-way, or the like, the essence of which was the authorisation to the owner of it to do what otherwise he could not lawfully do, it might seem, after the analogy of the delivery of corporeal things, that the title would not be complete until some act had been done under the agreement, forming a *quasi traditio*. At all events, an exercise of the right was necessary to enable the owner of the servitude to claim the benefit of the interdicts granted to him. (D. 8, 1, 20.)

6. A man can also in his will bind down his heir to raise his house no higher, lest he should obstruct the lights of a neighbour's house; or to suffer that neighbour to run a beam into his wall; or to receive his raindrops; or to suffer him to go across his farm, or to drive beasts, or to lead water from it. (J. 2, 3, 4.)

B. Conditional Servitudes.

Strictly a servitude was absolute; it could not be created to date from a future day or event, nor be limited in its duration; but if such limits were agreed upon, they formed a ground of defence if the servitude were sued for in disregard of

them. Practically, therefore, such limits could be imposed. (D. 8, 1, 4.)

The degree of enjoyment (*modus*) was subject to be varied by agreement. Thus, a road might be granted only for a certain kind of vehicle, or for loads not exceeding a certain weight. (D. 8, 1, 4, 1; D. 8, 1, 4, 2.) Also it might be limited to use on alternate days or between specified hours. (D. 8, 1, 5, 1; D. 8, 4, 14.)

c. Restrictions on the Creation of Servitudes.

1. An owner cannot have a servitude over his own land (*nulli res sua servit*). It would be absurd to say that an owner, who as such has every right of use and enjoyment, had through a servitude some definite or particular right of use or enjoyment. The rule is equally applicable to co-owners, although with less convenience: and if any co-owner desires to have some particular kind of enjoyment secured to him, he can do so only by resorting to a partition. (D. 8, 2, 26.)

2. The right contained in a servitude imposes on the owner of the land subject to the servitude only a negative duty. The duty it casts upon the owner is either not to do something, i.e. to abstain from exercising a right, or to forbear hindering another from doing something which otherwise he would have a right to forbid.¹ If the servitude consists in not doing (*in non faciendo*), it is said to be negative (*servitus negativa*); if it consists in forbearance (*in patiando*), it is said to be affirmative (*servitus affirmativa*), and means permission to do acts that would otherwise be unlawful.

Illustrations.

A right of way is an *affirmative* servitude. The owner of the servient land is bound to *suffer* the owner of the dominant land to walk on his land.

A servitude of lights or prospect is *negative*. The owner of the servient land is bound *not to do* anything to shut out his neighbour's lights or view.

In one instance, and in one only, a positive obligation was added to the purely passive conduct required from the owner of land subject to a servitude. A person whose wall or pillars were used to support another man's building, might, if it was agreed upon, be obliged not merely to suffer the superstructure to rest, but also to repair the wall. This result was not reached without controversy. Gallus denied that an obligation to repair could be thrown upon the owner of the wall or other support, because a servitude could not require any positive act (*in faciendo*); but the contrary opinion, supported by Servius, was finally established. (D. 8, 5, 6, 2.) In this case, a right *in personam* is added to, and made to go along with, the servitude. As a relief to the

¹ *Servitutum non ea natura est, ut aliquid faciat quis, sed ut aliquid patiatur, aut non faciat.* (D. 8, 1, 15, 1.)

owner of the subject land, he was allowed to surrender the foundations, if he did not wish to repair them. This case is strictly an exception, for in the analogous servitude of inserting joists or beams in another's wall, no such obligation to repair could be imposed. (D. 8, 5, 8, 1.)

3. A servitude cannot be only burdensome; it must be also beneficial to the possessor of the servitude.

Illustration.

An agreement that A shall not go over a particular part of his own land, or that A shall not search for water in his own land, is void. (D. 8, 1, 15, pr.)

4. There cannot be a servitude of a servitude (*servitus servitutis esse non potest*). This rule would prohibit a person bequeathing to a legatee a usufruct of a right of way; but in such a case the heir was bound to permit the legatee to enjoy the right of way, if the legatee gave security to renounce all claim to it on his death. The remedy of the legatee was an *actio incerti*. (D. 33, 2, 1.)

Illustrations.

Titius has a right of leading water (*aquae ductus*) through several estates. Not any of the owners of those estates, nor any neighbour, can enjoy the right of drawing water (*aquae haustus*) from the channel. By special agreement, however, that right could be granted by Titius; but such a right would not be given to them as owners or neighbours, and therefore would not strictly be a servitude. (D. 8, 3, 33, 1.)

Gaius has the usufruct of land to which is attached a right of way over the land of Maevius. Gaius, as having only a servitude, cannot bring the usual action for the vindication of servitudes, but if Maevius or any one else molests him in the use of the road, he can sue by the interdict *uti possidetis*, on the ground that such molestation is an infringement of his right to the use of his land. (D. 7, 6, 1, pr.)

DIVESTITIVE FACTS.

A praedial servitude was not lost by the death or *capitis deminutio* of the person to whom it was granted. (D. 8, 6, 3.)

1. Surrender of the servitude (*remissio*). This may have been done in olden times by the *cessio in jure*, but when that mode fell into disuse it was done by simple agreement. (D. 8, 3, 34, pr.) The remission might be tacit, as by permitting any act that destroyed the servitude; e.g. blocking up a wall, or building so high that the raindrops (*stillicidia*) could not fall. (D. 8, 6, 8.)

2. MERGER (*Confusio*).—Inasmuch as a servitude was a single detached enjoyment, it followed that when the person to whom a servitude was due became owner of the land on which the servitude was imposed, the greater swallowed up the less. (D. 8, 6, 1.) So complete was the extinction, that even if the

lands were afterwards separated and belonged to different owners, the servitude was not revived except by the usual modes of creating servitude. (D. 8, 2, 30, pr.) If, however, the owner of the dominant land acquired only a part of the servient land, the servitude remained intact, because it was indivisible, and could not be partly lost and partly retained. (D. 8, 6, 30, 1.)

3. NON-USE (*non utendo*).—The period of *usucapio* for releasing land from praedial servitudes was two years. (Paul, Sent. 1, 17, 1.) This period was extended by Justinian to ten years if both parties lived in the same province, and twenty years if in different provinces. (C. 3, 34, 13.)

An important distinction existed between urban and rural servitudes. Urban servitudes are negative, rural servitudes are affirmative. A right of way, to be kept alive, must be exercised; if no one actively uses the way for the period fixed by law, the right of way is destroyed. It is a *discontinuous servitude*; it is kept up by intermittent acts from time to time, and cannot be continuously enjoyed. But in the case of a servitude of lights, the person that enjoys it cannot do anything to keep it alive; it consists in the owner of the servient land not doing something, and so long as that is not done, the servitude is fully alive. The servitude is continuously enjoyed, so long as it is enjoyed at all. The rule, then, may be stated thus:—In continuous servitudes, the period of prescription is reckoned from the time that an act is done by the owner of the servient land that negatives the servitude; in discontinuous servitudes, the period is reckoned from the last time the servitude was used by the owner of the dominant land. (D. 8, 2, 6.)

A servitude is not lost through non-use if the following conditions are complied with:—(1.) A usufructuary, tenant, guest, or other person using the road or servitude in the name of the land to which it is attached, exercises such a use as prevents prescription being reckoned. (D. 8, 6, 20; D. 8, 6, 24; D. 8, 6, 5; D. 8, 6, 6.) (2.) The use must be at the times, and in the manner, agreed upon. (D. 8, 6, 10, 1; D. 43, 20, 5, 1.) (3.) The servitude must be used as a servitude belonging to the land to which it is attached, and not, for example, as a public road. (D. 8, 6, 25.)

4. Destruction or change of the property destroys any servitudes attached to it, as when the dominant house is burned down, and not rebuilt. But if another like it is put up, the

servitude is preserved. (D. 8, 2, 20, 2.) If a place over which a right of way exists is swamped by a diversion of a stream, but before the period of prescription is gone the way is restored by the deposit of alluvium, the servitude revives; and it seems, even if the time had elapsed, the owner of the servient land could be compelled to re-grant the servitude. (D. 8, 6, 14.)

REMEDIES.

A. For Rights.

The actual enjoyment of servitudes was secured by interdict; but the remedy by interdict was given subject to the analogy to corporeal possession. Interdicts existed only for affirmative, not for negative servitudes; and their object was to stop the owners of the several lands from forcibly preventing the performance of the acts constituting the servitudes. Hence two characteristics of these remedies. (1) No person could demand an interdict who had not previously done the acts permitted by the servitude; and (2) the interdict did not deal with the question of right, but secured undisturbed enjoyment to a person that had, whether with or without title, in point of fact claimed and exercised the right. (D. 43, 19, 1, 2.)

I. Rights of way.

1. An interdict (*de itinere actuque privato*), whose object was to secure free passage over the burdened land, and damages for interruption. (D. 43, 19, 3, 3; D. 8, 5, 2, 3.)

The Praetor says—When a footpath, a driving road, or a regular road, is in dispute, and you have used it neither by violence, by stealth, nor by leave from another within the preceding year, I forbid any violence to be employed to hinder you from such use.¹

2. Interdict to obtain permission to repair. Every one having a right of way, had by implication a right to keep the road in repair. (D. 43, 19, 3, 13.)

The Praetor says—When you have used a path or driving-road within the preceding year, neither by violence nor by stealth, nor by sufferance from another, I forbid any violence to be used to hinder you from repairing that path or driving-road, supposing you have a right so to do. He that would use this interdict must give security to the opposite party against any damage that, though yet undone, may be caused by his fault.²

To obtain this interdict, the plaintiff must prove more than mere quasi-possession; because the right to repair is not attached to the use or exercise of the servitude, but only to the right to the servitude. (D. 43, 19, 3, 11.) Also the plaintiff must give security against any damage he may do by his repairs. (D. 43, 19, 5, 4.)

II. Rights to water.

1. *Aqua cottidiana* is water that might be used every day of the year (D. 43, 20, 1, 2); it is opposed to *aqua aestiva*, water used only in summer, even if it could be used in winter. (D. 43, 20, 1, 3; D. 43, 20, 6.)

The Praetor says: As within the preceding year you have led the water in dispute neither by violence nor by stealth, nor by sufferance on his part, I forbid any violence to be used in order to hinder you from so leading it.

¹ Praetor ait: "*Quo itinere actuque privato quo de agitur, vel via, hoc anno, nec vi, nec clam, nec precario ab illo usus es, quominus ita utaris, vim fieri veto.*" (D. 43, 19, 1, pr.)

² Ait Praetor: "*Quo itinere actuque hoc anno non vi, non clam, non precario ab alio usus es, quominus (id) iter actumque, ut tibi jus esset, reficias, vim fieri veto; qui hoc interdicto uti volet, is adversario damni infecti, quod per ejus vitium datum sit, caveat.*" (D. 43, 19, 3, 11.)

This interdict could be claimed by any person that had used the water under the conditions applicable to rights of way; and it may be brought against every one that disturbs the claimant in the use of the water. (D. 43, 20, 1, 25.) The defendant must give security for the free exercise of the servitude, without prejudice to his contention that the servitude was not legally binding. (D. 43, 20, 7.)

2. Interdict for repairs.

There was an interdict to enable the owner of the servient land to repair the channel of the watercourse, or to cleanse it. The Praetor says: I forbid any violence to be used to hinder him from freely repairing and cleaning out the channels, covered ways, or enclosed pools, in order to lead the water, provided only he leads it no otherwise than he did last summer, neither by violence, nor by stealth, nor by sufferance on your part. The object of it is to secure freedom for the task of repairs or cleaning (D. 43, 21, 3, 8); and its aid can be obtained by the same persons that have a right to the use of the aqueduct. (D. 43, 21, 3, 7.)

3. *Aquae haustus* and *pecoris ad aquam appulsus*.

In this case, as in *aquae ductus*, there are two interdicts—one to secure the use of the water, the other for repair of the fountain or well. (D. 43, 22, 1, pr.; D. 43, 22, 1, 4; D. 43, 22, 1, 6.)

III. Rights in private sewers (*cloacae*).

In this case, again, there are two interdicts, of which the words of one only are contained in the Digest. The plaintiff must give security against any damage he may do by his repairs. (D. 43, 23, 1, 12; D. 43, 23, 1, 14.)

B. INVESTITIVE FACTS.

I. *Actio Confessoria*.—This action tries the right to the servitude (D. 8, 5, 9); and the form was either, it is my right to do what you have prevented; or, it is not your right to do what you have begun (*jus mihi esse, jus tibi non esse (aedificandi)*). It can be brought only by the owner of the dominant land (D. 8, 5, 2, 1); or by a person having substantially the same rights, as a mortgagee in possession. (D. 8, 5, 16.) It lies against the owner of the servient land (D. 8, 5, 4, 4), or any one else that interferes with the enjoyment of the servitude, although in this case the interdict would generally be the preferable remedy. (D. 8, 5, 10, 1.)

II. *Actio Publiciana in rem*.—This action is given to a *bona fide possessor*, whose right will be, but is not yet, perfected by *usucapio*. Usufruct and praedial servitudes may be thus vindicated, at least when there is *traditio* or *patientia*, by the owner of the servient land. (D. 6, 2, 11, 1.)

III. Interdict for water drawn from an artificial reservoir (*ex castello*). This interdict to enforce a servitude of water (whether personal or praedial) arising from a *castellum* or reservoir that is filled with public water (*aqua publica*), (D. 43, 20, 1, 39), is not merely possessory; it involves the question of right, and is thus a test of the existence of any investitive fact. (D. 43, 20, 1, 45.) The Praetor says: Since from that reservoir he has been allowed to lead water by one that had a right to do so, I forbid any violence to be used to hinder him from leading it as he has been allowed. And when an interdict shall have been given in regard to the doing of the work, I will order to give security for the damage that may be done.¹

¹ Ait Praetor: "Quo ex castello illi aquam ducere ab eo, cui ejus rei jus fuit, permissum est; quominus ita, uti permissum est, ducat, vim fieri veto. Quandoque de opere faciundo interdictum erit, damni infecti caveri jubebo." (D. 43, 20, 1, 38.)

IV. *Actio oneris ferendi*.—According to some, this servitude, which had the peculiarity of having an obligation to repair added to it, had a special action. (D. 8, 5, 6, 2.)

DIVESTITIVE FACTS.

I. *Actio Negatoria*.—An occasion arises for this action denying the existence or showing the termination of a praedial servitude in two cases; when one, claiming a servitude, forbids an owner to do something that as owner he has a right to do on his own land (D. 8, 5, 4, 7); or when any one does anything that in the absence of a servitude (whose existence is disputed) he has no right to do. (D. 8, 5, 17, 2; D. 8, 5, 13.) The object of the action is to obtain security against a repetition of the conduct complained of (D. 8, 5, 12); and also damages when the defendant has without right used the land. (D. 8, 5, 4, 2.)

EMPHYTEUSIS.

DEFINITION.

The tenure afterwards called *emphyteusis* is to be traced to the long or perpetual leases of lands taken in war granted by the Roman State. The rent given for such land was called *vectigal*, and the land itself *ager vectigalis*. The advantages of the perpetual lease were appreciated by corporations, ecclesiastical and municipal. Corporate bodies are generally inefficient landlords; and a tenure that practically relieves them from all concern in the management of the land, and gives them simply a right in perpetuity to an annual sum, seems most beneficial for their interests. The same tenure was adopted by private individuals, under a new name, at least after the time of Constantine, and was extended from lands to houses. The State still had its *agri vectigales*, but the perpetual tenure given by private persons and corporations was called *emphyteusis*, the land *fundus emphyteuticarius*, the person to whom it was given *emphyteuta*. It may be defined as a grant of land or houses for ever, or for a long period (D. 6, 3, 3), on the condition that an annual sum (*canon*) shall be paid to the owner or his successors, and that if such sum is not paid the grant shall be forfeited. (D. 6, 3, 1, pr.; D. 6, 3, 2.) The person to whom the grant is made is not owner, but he has Praetorian actions for the property against all possessors, and therefore has a right *in rem*. (D. 6, 3, 1, 1.)

The question whether the *emphyteuta* is in law owner, appears in the controversy long agitated among the juriconsults, whether he was a purchaser or a mere hirer. To have regarded him as a purchaser would have made him owner, and the position of the vendor (*dominus emphyteuseos*) extremely precarious. On the other hand, if the *emphyteuta* were a mere hirer,

the rules applicable to hire would be out of place, considering the perpetual nature of his interest. Such are the considerations that may be supposed to have influenced the Emperor Zeno to terminate the dispute in the manner stated in the Institutes.

So very closely akin are buying and selling to letting and hiring, that in certain cases the question is usually raised whether the contract is one of buying and selling or of letting and hiring.

[It has been raised, for instance, where anything is let out *for all time*, as is the case with the land of townsmen (*municipes*), let on the express condition that so long as the revenue (*vectigal*) is duly paid, the estate shall not be taken away either from the original tenant (*conductor*) or from his heir. But the prevailing opinion is that this is a case of letting and hiring.]

This is the case, for instance, with lands made over to be enjoyed *for all time*; that is to say, on condition that so long as the rent or income (*pensio, redditus*) is paid for them to the owner, it shall be unlawful to take away an estate of this sort either from the original tenant or from any one to whom he or his heir may have sold it, given it as a present or as a dowry, or alienated it in any other way whatever. Now a contract such as this caused doubts among the earlier writers; and some thought it a case of letting, others of selling. The *lex Zenoniana* was therefore passed, which determined that the contract of *emphyteusis* had a peculiar nature, and must not lean on either letting or selling, but must rest on agreements of its own. It determined further, that if any special agreement were made, it should stand just as if this were the nature of the contract; but that if no special agreement were made in regard to the risk of the property, then if the property wholly perished, the risk thereof should fall on the owner, whereas partial damage should be the tenant's loss. This is the law now in use by us. (G. 3, 145; J. 3, 24, 3.)

RIGHTS AND DUTIES.

A. Rights of *Emphyteuta*.

1. Use and enjoyment (*utendi fruendi*). There can be no doubt that the right of the *emphyteuta* was larger than the right of the usufructuary, but how much larger? Probably the scantiness of passages bearing on this subject shows that few, if any, restrictions were imposed on the *emphyteuta*. (D. 43, 18, 1, 1; D. 43, 18, 1, 6.) The *emphyteuta* must, perhaps, for this purpose, be compared with the *bona fide possessor* rather than with the usufructuary; for the *emphyteuta*, like the former, and unlike the latter, was entitled to the fruits as soon as they were separated from the land, whether gathered or not. (D. 22, 1, 25, 1.) The *emphyteuta* was subject apparently to no other restriction than that he must not depreciate the property. Perhaps the strongest evidence of this view is that he was not entitled to compensation for improvements. (C. 4, 62, 2.)

2. Alienation. The emphyteusis passed to the heirs, and, subject to certain restrictions, could be alienated. Hence, the greater including the less, it could be hypothecated (D. 13, 7, 16, 2), or burdened with servitudes. (D. 43, 18, 1, 9.)

B. Duties of Emphyteuta = rights in *personam* of *dominus emphyteuseos*.

1. To pay the rent agreed upon (*canon*), without any previous demand, at the time agreed upon, and notwithstanding partial loss of the property. (C. 4, 61, 1.) This could not be increased by the owner (*dominus emphyteuseos*). (C. 11, 70, 3.) The usufructuary paid no rent.

2. He must manage the property so as not seriously to reduce its value; but he is not to be interfered with on the grounds upon which a usufructuary may be sued, that he does not act like a good *paterfamilias*.

3. He must pay all the burdens attached to the holding of the land; and deliver the receipts (*apochae*) to the owner (*dominus emphyteuseos*). (C. 4, 46, 2; C. 10, 16, 2.)

These were the rules applicable in the absence of special agreement; but if any variation were made, it would be supported. (C. 4, 46, 2.)

INVESTITIVE FACTS.

I. By agreement in writing (*pactum*.) (C. 4, 61.)

II. By prescription (not by *usucapio*. D. 6, 2, 12, 2.) By analogy to servitudes we may infer prescription; and in the case of a possessor without title, the limit of 40 years (negative prescription) seems to be given by Anastasius. (C. 11, 61, 14.)

DIVESTITIVE FACTS.

I. The total loss or destruction of the property. (C. 4, 66.)

II. Prescription—possession by the owner for the requisite number of years (*usucapio libertatis*).

III. Surrender or merger (*confusio, consolidatio*).

IV. Forfeiture. In the absence of special agreement, an emphyteusis was forfeited—

1. For deterioration of the property.

2. For non-payment of rent, when the land was held from an ecclesiastical corporation, for two years; in any other case, three years. (C. 4, 46, 2; Nov. 7, 3, 2.)

3. If the emphyteuta do not produce to the owner, within three years, the receipts (*apochae*) for public burdens. (C. 4, 46, 2.)

4. If he attempts to transfer the emphyteusis without complying with the rules prescribed. (C. 4, 46, 3.)

If the owner would not receive the rent, with the object of causing a forfeiture, the emphyteuta was empowered, in the presence of witnesses, to deposit the money in sealed bags; and this tender was equal to payment. (C. 4, 46, 2.)

TRANSVESTITIVE FACTS.

1. By bequest from the emphyteuta. (D. 30, 1, 71, 5.)

2. Alienation by delivery in the lifetime of the emphyteuta. This right was not unqualified. The consent of the *dominus* was necessary, and his acceptance of the new emphyteuta. The owner had the right of pre-emption. The proceedings to be adopted are prescribed by Justinian. (C. 4, 46, 3.) The emphyteuta ought to transmit to the *dominus* formal notice of the sum that a purchaser is willing to give for it. The owner has two months to decide whether he will take the emphyteusis at that sum; and if he wishes it, the transfer must be made to him. If he does not buy at the price named within two months, the emphyteuta can sell to any fit and proper person without the consent of the *dominus*. If such a person is found, the *dominus* must accept him as his emphyteuta, and admit him into possession either personally or by written authorisation, or by attestation, before notaries or a magistrate. For this trouble, the *dominus* was entitled to charge a sum (*laudemium*) not exceeding two per cent. on the purchase-money. If the owner does not make the acknowledgment within two months, then the emphyteuta can, without his consent, transfer his right to another and give him possession.

REMEDIES.

1. The emphyteuta has an action *in rem (utilis)*, given after the analogy of the vindication for ownership. 2. If he is only a *bona fide* possessor, he has the *actio Publiciana in rem*. 3. He has all the actions and interdicts requisite to protect his rights of enjoyment, like a usufructuary or owner.

SUPERFICIES.

DEFINITION.

Superficies or *jus superficarium* is a right to the perpetual enjoyment of anything built upon land, on payment of annual rent (*pensio*). (D. 6, 1, 74; D. 6, 1, 73; D. 43, 18, 2.)

RIGHTS.

A. Rights *in rem* of *Superficiarius*.—1. Enjoyment and use

(*utendi fruendi*). (D. 43, 18, 1, 6; D. 43, 18, 1, 1.) 2. Alienation, pledging, or burdening with servitudes. (D. 20, 4, 15; D. 43, 18, 1, 9; D. 43, 18, 1, 7.)

B. The duties of *Superficiarius* were to pay his annual rent, &c., just as in the case of emphyteusis. (D. 7, 1, 7, 2.)

INVESTITIVE AND TRANSVESTITIVE AND DIVESTITIVE FACTS.

Same as in emphyteusis.

REMEDIES.

1. *Actio in rem (utilis)*. (D. 6, 1, 7, 5; D. 18, 1, 1, 6; D. 43, 18, 1, 3.)

2. The possessory interdicts generally, as an owner or possessor. (D. 43, 16, 1, 5.)

3. Special interdict. The Praetor says: "As under the terms of letting or hiring you enjoy one of the other, the *superficies* in dispute, neither by violence nor by stealth nor by leave, I forbid any violence to be used in order to hinder the enjoyment. If any other action in regard to the *superficies* is demanded, after hearing the case (*causa cognita*), I will give it."

This is governed by the same rules exactly as the interdict *uti possidetis* (D. 43, 18, 1, 2); *causa cognita*, if for a short period, no *actio in rem*; but if for a long period, an *actio in rem* will be given. (D. 43, 18, 13.)

SECOND SUB-DIVISION.

DEPENDENT RIGHTS *IN REM*.

Rights *in rem*, of which the leading groups have been now enumerated and described, may exist either for their own sake—that is, for the benefit they confer, and for no ulterior purpose—or they may be created, not for their utility to the person that enjoys them, but as a means towards another end. Thus rights of ownership may be given to a man as security for rights *in personam*. If A owes B money, B's only remedy is against A, and if A fails, his debt is worth nothing; but if A gives B property, which can be converted into money on condition that if A fails to discharge his debt, B may sell the property and pay himself out of the proceeds, B's position is very much strengthened. Such, then, is the aspect of a pawn or mortgage towards a creditor; it is a mode of strengthening the weak point of all mere rights *in personam*, by giving the creditor valuable rights that avail against the whole world.

As regards a debtor, a mortgage may be looked at in another light; it is a way by which he may obtain temporary accommodation without entirely parting with his property. The first device by which this was accomplished in

the Roman Law was simple. An actual conveyance was executed by the borrower to the lender, with an agreement (*contractus fiduciæ*), that if the purchase-money were repaid by a day named, the lender would re-convey the property to the borrower. The conveyance was formal and effectual in law to vest the ownership in the lender. How long this continued to be the only mortgage known to the Roman Law it is not easy to guess; but at some period unknown a revolution in the character of the mortgage was very quietly accomplished by a simple edict of the Praetor. By the old arrangement, the borrower obtained his accommodation at a great risk. He gave up his ownership (*jus in rem*), and got in exchange only an action against the lender (*jus in personam*), who might meanwhile have sold the property, and deprived the borrower of his remedy. The borrower ran a serious risk, and was, in fact, left very much to the honour of the lender. It is curious to observe with what emphasis of vituperation Cicero denounces unjust lenders; because it shows that the instinctive desire of the lawgivers was to strengthen the weak point of the mortgage. Where the law is weak, honour is strong. Thus, a lender who on being paid his money refused to restore the property, or had deprived himself of the means of doing so, was held to be infamous. (Cicero pro Caecina, 3, 7-9.)

The change introduced by the Praetor was one that, without really weakening the security of the lender, gave complete protection to the borrower. It proceeded on the distinction already described between possession and property. Let the lender in effect, said the Praetor, have the possession of the property, and, in the last resort, the right of sale; but let the ownership remain with the borrower: let him retain his right *in rem*, and all the benefits (as, e.g., *usucapio*) that are attached to ownership. The lender has the actual possession and the right of sale (guarded by conditions preventing an improper or wrongful sale), which make him as secure as if he were owner; the borrower is still owner, and has therefore a remedy, not only against the lender, but against the whole world. This then was a typical mortgage, in which the lender obtained as much, and only as much, as was necessary to secure his loan, and the borrower, with the smallest possible loss, obtained the accommodation that he desired. This is the *pignus* of the Roman Law.

When first authorised by the Praetor, the *pignus* was constituted on a narrow but instructive basis. The Praetor sanctioned such a security only when the thing in question was actually given into the possession of the lender. Hence the difference between the contract of *fiducia* and that of *pignus*: in the former, there was a formal conveyance by *mancipatio* or *cessio in jure* (G. 2, 59); in the latter there was no conveyance, but only change of possession. Once the thing was in his possession, the lender had the right of sale; otherwise, he had not.

But although an improvement on the *fiducia*, the *pignus* was still inconvenient. The lender did not always desire the possession of the thing pledged, nor did the borrower always wish to part with the possession. Loss might be inflicted on the borrower without any corresponding benefit to the lender. Plainly, then, a last step remained to be taken,—to dispense with the transfer of possession. The last, or rather the penultimate step, was due to one Servius, of whom nothing seems to be known but the name, and that he lived before Cicero, who introduced an action by which he gave the landlord of a farm a right to take possession of the stock of his tenant for rent due, when the tenant had agreed that the stock should be treated as a pledge. This was the *actio Serviana*. It was extended, under the designation of *Actio quasi-Serviana*, or *hypothecaria*, to all cases in which it was agreed between borrower and lender that anything should be a pledge when possession was not delivered to the lender. Hence arose the *hypotheca*, or pledge of a thing by mere agreement (without any formality), and without the delivery of possession. The remedy of Servius availed not only against the borrower, but against all other persons, and thus established a true right *in rem*. On the other hand, the borrower kept his property in his possession, and enjoyed it until he made default in the payment of his debt; thus suffering no present inconvenience, and being enabled to borrow on the most advantageous terms.

It must not be supposed that because the three stages marked by the words *Fiducia*, *Pignus*, *Hypotheca*, were successive, that upon the introduction of the higher process the lower disappeared. In point of fact, pledges with and without possession continued to exist, and were subject to precisely the same rules, so that they fall to be considered together, and may in fact be treated as one. The earliest (*fiducia*) long co-existed

with the other two, and may have flourished up to the time of Constantine. That Emperor, however, gave it a death-blow, for he abolished the *lex commissoria*, which was of the essence of the *fiducia*; namely, that if the money borrowed were not repaid by a given day, the pledge would be forfeited, and become the absolute property of the lender. Moreover, when the ancient forms of conveyance, *mancipatio* and *cessio in jure*, fell into disuse, the *fiducia* lost the other pillar upon which it rested; and in the time of Justinian, if not earlier, it had passed into oblivion.

FIDUCIAE CONTRACTUS.

DEFINITION.

A *contractus fiduciae* is when anything is conveyed by *mancipatio* or *cessio in jure*, with the condition that if a certain sum is paid by a certain day, the thing shall be re-conveyed.¹

RIGHTS.

A. Rights of Creditor. I. Rights *in rem*.

1. The creditor to whom anything is conveyed (*fiduciae causa*) is owner, and may convey the property. Thus, if a creditor bequeaths the thing to some legatee, the debtor who conveyed the property must sue not the legatee for the thing, but the heir of the deceased for damages. (Paul, Sent. 2, 13, 6.)

2. The creditor has an inalienable right to sell. An agreement that he should not have power to sell, if the debtor made default, is void; but it is valid so far that the creditor must make a formal notification (*ter denuntiare*) to the debtor before proceeding to the sale.

II. Right *in personam*. The creditor is entitled to expenditure on improvements (*si creditor rem fiduciarium fecerit meliorem*). (Paul, Sent. 2, 13, 7.)

B. Rights of Debtor.

I. Rights *in personam*. 1. He may sell the property if it will yield a surplus, and the creditor is bound, on receiving his money, to remancipate the property, and enable the debtor to give a good title to the purchaser. (Paul, Sent. 2, 13, 3.) But he cannot sell to the creditor, who is in law already owner

¹ *Fiducia est cum res aliqua sumendae mutuae pecuniae gratia vel mancipatur vel in jure ceditur.* (Isidor. Orig. V. 25, 23.)

(D. 13, 7, 40); nor can the creditor buy it even through or in the name of another person, unless with the consent of the debtor. (Paul, Sent. 2, 13, 4.)

2. If the creditor sells [before the day named for forfeiture (?)], the debtor is entitled to any surplus after discharging the claim of the creditor. (Paul, Sent. 2, 13, 1.)

3. The debtor is entitled to a reconveyance on paying the sum agreed upon within the time agreed upon.

4. All that is gained through a slave pledged, goes to reduce the principal debt. (Paul, Sent. 2, 13, 2.)

INVESTITIVE FACTS.

Mancipatio, Cessio in jure.

DIVESTITIVE FACTS.

1. Fulfilment of condition, default of debtor. (*Fiducia committitur*),—(Cicero *Pro Flacco*, 21, 49–51.)

2. *Usureceptio*.

There are still some further grounds on which a man can acquire by *usucapio* what he knows to be another's. For suppose a man has given by *mancipatio* or by *in jure cessio* some property to another *fiduciae causa*, and then himself comes to possess that same property, then he may acquire it by *usucapio* within a year, and that even if it be landed property. This kind of *usucapio* is called *usureceptio*, because that which we once had we now recover by *usucapio*. (G. 2, 59.)

Now all *fiducia* is contracted either with a creditor in right of the pledge, or with a friend, that our property may be in greater safety with him. If, then, it is with a friend, *usureceptio* is certainly open to us in any case. But if with a creditor, it is open to us in any case only if the money is paid. So long, however, as it is not paid, *usureceptio* is open only if the debtor has neither hired the property from the creditor, nor asked to be tenant-at-will. But if not, a gainful *usureceptio* is open to the debtor. (G. 2, 60.)

REMEDIES.

A. Rights *in personam* of Creditor. *Actio fiduciae contraria*. (Paul, Sent. 3, 13, 7.)

B. Rights *in personam* of Debtor. *Actio fiduciae directa*.

This was an action *bonae fidei*, and condemnation involved infamy. (Cic. *Pro Caecina*, 7-9.)

PIGNUS AND HYPOTHECA.

DEFINITION.

Between *pignus* (pledge) and *hypotheca* (mortgage) there is no difference, so far as regards the *actio (quasi-Serviana)* for recovery. For when creditor

and debtor agree that any property shall be bound by the debt, then that property is included under both those names. But in other points there is a difference. For under the name *pignus* is properly included, as we say, what is at the time handed over to the creditor, especially if moveable; whereas, that which is not handed over, but is made liable by the bare terms of the bargain, is properly included under the name *hypotheca*. (J. 4, 6, 7.)

The distinction between *Pignus* and *Hypotheca*, it need scarcely be said, had nothing to do with the difference between moveables and immoveables.

Generally a *pignus* or *hypotheca* consisted of rights *in rem* over slaves or things, given as security for rights *in personam*. But it might consist of a right *in personam* that the debtor had against a third party, given as security to the creditor for a sum due by the debtor.

Illustrations.

Gaius is creditor to Titius for 50 *aurei*, and Gaius owes Maevius 20 *aurei*. Gaius may convey to Maevius his (Gaius') right to sue Titius for 50 *aurei*, as a security for the 20 *aurei* he owes to Maevius. If, in enforcing this security, Maevius recovers the 50 *aurei* from Titius, his debt is wiped off, and he must hand the balance to Gaius.

Suppose, instead of 50 *aurei*, Titius owed Gaius a slave on a contract of sale, and that Maevius recovered the slave from Titius. Then Maevius would hold the slave as a pledge for the 20 *aurei* Gaius owed him. (D. 13, 7, 18.)

Again, Titius gives a loan of 100 *aurei* to Gaius to rebuild his house, and, as we shall see, acquires an implied hypothec over the house. It was agreed that the rents of the tenants also should be hypothecated to Titius. Then Titius can sue the tenants (by *utilis actio*), and compel them to pay him over their rents. (D. 20, 1, 20.)

RIGHTS AND DUTIES.

A. Rights *in rem*.

(a.) Rights *in rem* of creditor.

If the creditor is not in possession, and if he is in a position to sue the debtor for the debt, he can bring an action to recover the possession of the hypothec from him or any one in whose hands it is. (C. 8, 14, 18; D. 20, 1, 17; C. 8, 28, 12; C. 8, 14, 15.)

If there is an agreement that the creditor shall not sue for one year, the same period will be applied to the hypothec. (D. 20, 6, 5, 1.) If the obligation is conditional, possession of the hypothec can be demanded only when the condition has occurred and the debt become due. (D. 20, 1, 13, 5.)

II. The right of sale.

On the other hand, a creditor can alienate a pledge in accordance with his agreement, although it is not his property. But perhaps this may seem to be done on the understanding that it is the wish of the debtor that

the pledge should be alienated : for he originally made the agreement that the creditor might sell the pledge if the money were not paid.

But lest creditors, on the one hand, should be hindered in pursuing their rights, and lest debtors on the other should too hastily lose the ownership of their property, we have, by our constitution, taken measures and fixed a regular course of procedure in the enforced sale (*distractio*) of pledges, by which sufficient and ample provision is made for the interests of both parties. (J. 2, 8, 1 ; G. 2, 64.)

The provisions made by Justinian were as follows :—If the parties agreed as to the manner, time, etc., of the sale, their agreement was to be observed ; if nothing was said in the contract as to the power of sale and the creditor wished to sell, he must, if he had possession, give formal notice of his intention to the debtor ; or, if he had not possession, obtain a judicial decree ; and after two years from either of those events he could sell. (C. 8, 34, 3, 1 ; D. 13, 7, 4 ; D. 13, 7, 5.)

If the same thing has been hypothecated successively to several persons, only the first of them has the power of sale, unless a subsequent creditor has, in the modes hereafter to be described, put himself in the place of the first. (D. 20, 5, 5 ; C. 8, 18, 1 ; C. 8, 18, 8 ; C. 8, 18, 5.)

The power of sale being given to secure a debt, cannot be exercised until the debt really exists (D. 20, 5, 4) ; *i. e.*, until the creditor is in a position to sue the debtor ; and ceases if the principal and interest are paid. (C. 8, 29, 2.) But the power remains until the *whole* of the debt is discharged ; and, therefore, so long as any part of the debt is unpaid (C. 8, 28, 6), or of the interest, or of the expenses necessarily incurred by the creditor, the creditor retains the power of sale. (D. 13, 7, 8, 5.)

Illustration.

A hypothec is made to secure an annual payment, to come into effect only if the money is not paid on each proper day (*nisi sua quaque die pecunia soluta est*). A sale cannot take effect until the last instalment is due and unpaid. If, however, the phrase is that it comes into effect if any of the money is not paid on the proper day (*si qua pecunia sua die soluta non erit*), the property may be sold after default of the first instalment. (D. 13, 7, 8, 3.)

III. The right of foreclosure.

The *Fiducia* was essentially a self-acting foreclosure ; if the debtor did not pay by the day named, the pledge became the absolute property of the creditor. After the analogy of this contract, in all probability, was introduced what is called the *lex commissoria*, or condition that the pledge should be forfeited to the creditor if payment was not made within the time limited. As we have seen, this condition could be inserted in mortgages down to the time of Constantine. (C. 8, 35, 3.)

About a century earlier, however (A.D. 230), Alexander introduced a new kind of foreclosure, which was afterwards more fully developed by Justinian. According to Alexander's constitution there must be a public notification of the hypothec and a year's delay. Finally, the ownership could be got by the creditor only by special petition to the Emperor. (C. 8, 34, 1.)

Justinian allowed foreclosure only when the creditor was unable to find a buyer at an adequate price. If the debtor and creditor live in the same province, the creditor must give formal notice after two years from the time that the obligation has accrued. If they live in different provinces, the creditor must apply to the provincial judge, who will serve a notice on the debtor, giving him a certain time to come in and pay the debt. (C. 8, 34, 3, 2.) If the debtor cannot be found, the judgment gives him a certain time to appear; if he does not appear, or appearing does not pay, the creditor will obtain the ownership on petition to the Emperor. After that the debtor has still two years' grace; but if he does not pay all principal and interest within that time, the ownership of the creditor becomes irrevocable. (C. 8, 34, 3, 3.)

IV. Right to hypothecate the thing hypothecated, or to transfer the hypothec to another.

Illustrations.

A is creditor of B, and has got the Tusculan farm hypothecated to secure the debt. A can in turn give this farm to C as security for a debt due by him to C. (C. 8, 24, 2; D. 20, 1, 13, 2; D. 44, 3, 14, 3; C. 8, 24, 1.)

If, however, B pays off A's debt, then C's hypothec is at once annihilated. (D. 13, 7, 40, 2.)

A, instead of hypothecating the land, could sell the hypothec, so that another should succeed to his place. (D. 20, 4, 19.)

(b.) Rights *in rem* of the debtor.

Subject to the rights of the creditor, the debtor still remains owner (*dominus*), and therefore can sell the thing hypothecated, but without prejudice to the creditor (C. 8, 14, 9); and may, under a rescript of Severus, sell it even to the creditor. (D. 20, 5, 12; C. 8, 14, 13.) Also, all accessions to the thing hypothecated belong to the debtor, and he suffers any loss that may arise by injury or evil befalling it. (D. 20, 5, 21, 2; C. 4, 24, 9.) Hence, whatever is acquired by a hypothecated slave goes to reduce the principal or interest of the debt. (Paul; Sent. 2, 13, 2.)

B. Duties (reciprocal) of Creditor and Debtor.

(a.) Duties of creditor = Rights *in personam* of debtor.

I. To return the thing hypothecated if in his possession when the obligation for which it was given has been discharged, or tender of payment has been made. (D. 13, 7, 9, 3; D. 13, 7, 40, 2; D. 13, 7, 20, 2.) It would appear that the creditor could retain the pledge unless other money that he lent without hypothec was also repaid him, at least if he had possession. But this was only as against the debtor. (D. 8, 27, 1.)

A creditor, too, that has received a pledge is under an *obligatio re*. For he is liable to an *actio pigneratitia* to make him give up the thing he received. (J. 3, 14, 4.)

II. If the creditor exercises his power of sale, he must give the surplus, after paying himself, to the debtor. (D. 13, 7, 42.) If he has not got the money, the debtor may require him to give his authority to sue the purchaser. (D. 13, 7, 24, 2.)

III. If he is in possession, the creditor gathers the crop and sets it off against the debt. (C. 4, 24, 1; C. 4, 24, 3.) This includes the services of slaves and the rent of houses (C. 4, 24, 2), and generally every benefit derived from the property. Hence also any damages the creditor may have received on account of things stolen (D. 13, 7, 22, pr.) must be added, unless the debtor was the thief. (D. 47, 2, 79.)

The creditor, if it were part of the contract, might, however, keep the produce (*fructus*) instead of interest; and this was a well-known arrangement called *antichresis*. (*Ut creditor pro pecunie debite usuris, fructus rei pignorate habeat.*) (D. 20, 1, 11, 1; D. 13, 7, 35.)

IV. Generally, the creditor is answerable for wilful or negligent harm.

But since a pledge is given for the good of both parties—for the debtor's good, because the money is more readily lent him; for the creditor's, because the money he lends is in greater safety—it is held to be enough that the creditor in guarding the property should use all possible (*exacta*) diligence. If he does this, and yet by some chance mishap loses the property, he is not answerable; nor is he hindered from claiming the money lent. (J. 3, 14, 4.)

(b.) Duties of debtor = Rights *in personam* of creditor.

I. If he is in possession by gratuitous permission or hire from the creditor, and the creditor sells, he must deliver up possession, and is liable for damages if he does not. (D. 13, 7, 22, 3.)

II. He must pay all necessary expenses incurred by the creditor for the property hypothecated; as, *e.g.*, repairing a house, or medical attendance on a slave, although the slave died and the house afterwards was burned. (D. 13, 7, 8.)

A question arises whether expenses not necessary, but beneficial to the property, ought to be allowed. Paul speaks generally of improvements (Paul, Sent. 2, 13, 7), which would include beneficial expenditure (*utiles impensae*). Ulpian speaks with more hesitation. (D. 13, 7, 25.) He recommends a middle course to the judge: on the one hand, not to be too burdensome on the debtor; and on the other, not to be too fastidious in disallowing beneficial expenditure by the creditor. He puts two cases illustrative of his meaning. A creditor teaches slaves a handicraft or skilled work. If this was done with the consent of the debtor, of course the expenditure must be allowed; also, if the creditor only followed up what had already been begun. Necessary instruction must also be allowed, but further than that Ulpian was not inclined to go. The other case is somewhat different. A large forest or pasture is hypothecated by a man who is scarce able to pay the creditor; this creditor cultivates it, and makes it worth a great deal of money. Ulpian thought it was too hard that the debtor should thereby be improved out of his property.

III. He must pay all damage sustained by the creditor through the use of the thing hypothecated. Thus, if he knowingly hypothecates a slave, a habitual thief, he must pay all damage suffered by the creditor, and cannot escape by surrendering (*noxae deditio*) the slave to the creditor. (D. 13, 7, 31; D. 47, 2, 61, 3.) But if he were ignorant of the character of the slave, he was permitted the indulgent alternative. (D. 47, 2, 61, 1.)

c. Rights of Concurrent and Subsequent Creditors among themselves.

I. When several creditors acquire their hypothec in the same thing at the same time, they have equal rights: one has no preference over the other. (D. 13, 7, 20, 1.)

II. When the same thing is hypothecated at different times to several persons, he that has the first hypothec excludes all the others; he is entitled to be paid in full, and the balance only is distributed among the subsequent creditors in the order of priority.

What is priority in time? The time in question is the date of the contract of hypothec, not of obtaining possession, nor of the debt for which the hypothec is given.

Illustrations.

Titius hypothecates his farm to Maevius, and nothing is said about a power of sale; afterwards he hypothecates the same farm to Gaius, giving him an express power of sale, and delivers to him possession. Maevius is prior, and is entitled to be paid in full before Gaius gets anything. (D. 20, 4, 12, 10.)

Marcus gives a loan to Fabius without security, and afterwards Fabius borrows from Gallus, and gives him a hypothec on his estate. Then Fabius gives Marcus a hypothec on the same estate. Gallus is first, because, though his debt is later, his contract of hypothec is earlier. (D. 20, 4, 12, 2.)

Sempronius is heir to Sosianus, and a hypothec is made of property belonging partly to Sempronius and partly to Sosianus. The creditors of Sosianus, who had no hypothec, are postponed, even in regard to the property of Sosianus, by this hypothec. (C. 8, 18, 3.)

Servius promised money to Gaius conditionally, and by way of security at the same time hypothecated his farm. Before the condition was fulfilled Servius accepted a loan from Titus, and hypothecated the same farm to him. Afterwards the sum promised to Gaius became due, the condition having been fulfilled. Which was prior, Gaius or Titus? Gaius is first, because, according to the rule of Roman Law, when a condition was fulfilled, the obligation was regarded as taking effect from the moment it was made; and thus Gaius was first with the obligation as well as the hypothec. (D. 20, 4, 11, 1.)

An heir pledges a farm belonging to himself as security for a conditional legacy that he is bound to pay. Afterwards he pledges the same farm for money lent to himself. The condition of the legacy is fulfilled, and it becomes payable. The legatee is preferred to the lender, because of the retroactive effect of a fulfilled condition. (D. 20, 4, 9, 2.)

Priscus hired a bath from Julius from the next kalends, and agreed that his slave Eros should be security for the rent. Before the kalends Priscus borrowed money from Maevius, and hypothecated Eros to him. In this case Julius had priority to Maevius, although there was nothing actually due for rent at the time Maevius made his advance. The reason assigned is, that the hypothec was attached to the contract of hire in such a manner that, without the consent of Julius, it could not be got rid of. Julius had the first hypothec. (D. 20, 4, 9, pr.)

Gallus agrees with Sempronius to advance him money from time to time; as security Sempronius hypothecates to him his farm. Then, before any money had been advanced, Sempronius borrowed from Titius, and hypothecated the same farm. Gallus afterwards advanced money, under the agreement, to Sempronius. Which has priority, Gallus or Titius? It seems Titius had the priority. The distinction between this and the former case seems to be as follows: When Priscus hired the bath, it was out of his power to prevent the obligation accruing for the security of which the hypothec was granted. Unless he were relieved by Gallus from the contract of hire, the rent became due by the mere lapse of time, whether Priscus occupied the bath or not. In the second case, Sempronius certainly was not bound to accept any money from Gallus, even—which is doubtful—if Gallus were bound to advance the money. It lay, therefore, entirely with Sempronius whether any obligation would be incurred towards Gallus or not. This seems to distinguish the case from conditional obligations, in which the condition is out of the power of the debtor; and thus no obligation arose between Gallus and Sempronius until Gallus actually advanced his money. This being posterior to the advance of Titius, the latter, accordingly, had priority. (D. 20, 4, 1, 1; D. 20, 4, 11, pr.)

A farmer (*colonus*) agreed with his landlord, Titius, that the stock brought on the farm should be hypothecated for the rent. Before bringing to the farm part of what would be stock he pledged it for a loan to Maevius. Then he brought it to the farm. Here Maevius has the priority, because the agreement with the landlord did not give him a hypothec until the stock was actually on the farm. (D. 20, 4, 11, 2.)

A person that pays off a prior creditor is entitled to priority.

Illustrations.

Seius borrowed from Titius, and hypothecated to him a house. Then he borrowed from Maevius, hypothecating the same house. Gaius now advanced money to Seius to enable him to pay off Titius, on condition that he should have the hypothec that had been given to Titius. Gaius is prior to Maevius. (D. 20, 4, 12, 8.) But the contract must be clearly on the condition that the same thing should be hypothecated, and that Gaius should take the place of Titius (*ut idem pignus ei obligetur, et in locum ejus succedat*). (C. 8, 19, 1.) In the same case, Maevius had a right to pay off Titius (*jus offerendi*) on tendering the amount of the debt and interest for which the house was hypothecated. (C. 8, 19, 4; D. 20, 4, 20.)

Lucius Titius advanced money on interest on a hypothec; and to the same debtor Maevius advanced money afterwards on the same security. Is Titius entitled to priority for the interest due—not only before, but after the advance of Maevius? He is entitled to the whole of the interest and principal. (D. 20, 4, 18.)

Maevius advanced a sum to Titius on a hypothec of a house, and afterwards Seius lent 50 *aurei* on a hypothec of the same house. Subsequently Maevius made a further advance of 40 *aurei* on the same security. Suppose the house was not worth more than the first advance of Maevius and the 50 *aurei* of Seius. If Seius paid Maevius the first advance and interest, he was entitled to hold the house, and pay himself before Maevius could claim the second advance of 40 *aurei*. (D. 20, 4, 20.)

EXCEPTIONS to the rule of priority.

The Romans had no registration of mortgages, either for moveable or immoveable property. But if a hypothec were made by a public deed—*i. e.*, sealed up in the presence of witnesses and prepared by a notary (*tabellio*)—it had priority over hypothecs attested only by private documents. Leo gave the same privilege of priority to a private writing signed by three good and respectable witnesses (C. 8, 18, 11); and Justinian continued and confirmed the privilege. (Nov. 73, 1.) But in certain cases priority in time was postponed to other considerations.

1. The Imperial Exchequer (*Fiscus*) came before all creditors for arrears of fines. (C. 4, 46, 1.)

2. If money was advanced to buy office (*militia*), expressly on the condition of obtaining priority, the loan obtained priority. (Nov. 9, 7, 4.)

3. A married woman has the first preference in suing for the recovery of her *dos*, but she has no preference in respect of the *donatio ante nuptias*. (C. 8, 18, 12, pr., 2.)

We have also given her an implied mortgage (*hypotheca*); and further, we have held that she is to be preferred to other mortgagees, but only when she is trying in person to recover her dower. It is forethought for her alone that has led us to bring in this rule. (J. 4, 6, 29.)

4. An advance of money on the security of any house or

property, for the purpose of preserving it from destruction, ranks next in order of preference. (D. 20, 4, 5.)

Other privileged hypothecs rank according to their priority in time, but are preferred to all non-privileged hypothecs.

1°. The hypothec of pupils over property bought by their tutors with their money. (D. 20, 4, 7, pr.; C. 7, 8, 6.)

2°. The hypothec of one that advances money, or pays for the rebuilding of a house, on that house. (D. 42, 5, 24, 1.)

3°. The hypothec that one has over a thing bought with his money, if he has specially bargained for it at the sale. (C. 8, 18, 7.)

Other hypothecs took the rank determined by their order in time; and it need hardly be added, that all secured creditors were preferred to those that were not secured by pledge or hypothec. (C. 8, 18, 9.)

INVESTITIVE FACTS.

A. Modes of Creating a Hypothec.

(A.) By agreement between debtor and creditor.

I. Simple agreement (*nuda conventio*), without any formality, without writing, and without delivery of possession. (D. 13, 7, 1, pr.) This was strictly *hypotheca*. The precise words are immaterial, provided they disclose an undertaking that anything shall be hypothecated to secure the performance of any obligation. (D. 20, 1, 4.) Thus, a person in his absence might hypothecate his property by letter. (D. 20, 1, 23, 1.) The agreement was generally in writing, but that was not essential. (C. 8, 14, 12.)

II. Simple agreement, with delivery of possession to the creditor (*pignus*). (D. 13, 7, 1, pr.)

III. By last will. If the debt is in existence, the hypothec dates from the death of testator; if not, then from the existence of the debt. (D. 13, 7, 26; D. 34, 1, 2.)

(B.) By operation of law (*tacita hypotheca*).

Certain persons in respect of certain debts were invested by special enactments with a hypothec over the whole or particular parts of the property of their debtors. We may divide those cases into two groups, according as the creditor had a hypothec over all the property of his debtor, or over particular things only.

(a.) Implied hypothec over all the property of the debtor.

1. The hypothec of the Exchequer (*Fiscus*) extended to all

the property of its debtors, and even of the sums due to them (*nomina*) if they were ascertained and undisputed (*liquida*), whether the debt was for taxes or contract. (D. 49, 14, 46, 3; C. 8, 15, 1; C. 8, 15, 2; C. 4, 15, 3.)

2. The husband had a hypothec for the *dos*, if he were evicted from the dotal property. (C. 5, 13, 1, 1.)

3. A wife or her heirs had a hypothec over the husband's property for the restitution of her *dos*. (C. 5, 13, 1, 1.)

4. Pupils and minors had a hypothec over the property of tutors and curators, as security against maladministration. (C. 5, 37, 20.)

5. So children under *potestas* over the property of their father, in respect of the property coming to them on the mother's side (*bona materna*). (C. 5, 7, 8; C. 6, 61, 6, 4.)

6. So also legatees and *fidei commissarii* over the property of the deceased, in security for the payment of their legacy or trusts. (C. 6, 43, 1; C. 6, 43, 3; Nov. 108, 2.)

(β.) Implied hypothec over specified property of the debtor.

1. The most important instance was URBAN HYPOTHEC. This was an implied hypothec that the landlord had over the furniture in the house hired from him, as security for the rent, and all other claims that he might have against his tenant (*inquilinus*) arising out of the contract of letting. (D. 13, 7, 11, 5; D. 20, 2, 4.) This hypothec was originally confined to Rome and its suburbs, and was extended to the provinces only by Justinian. (C. 8, 15, 7.) It applied to granaries (*horrea*), inns (*deversoria*), and threshing floors (*areae*), as well as to dwelling-houses, but not to farms (*praedia rustica*). (D. 20, 2, 1, 4; C. 8, 15, 5.) It did not cover all articles ever found on the premises, but only what (*invecta et illata*) were brought for personal use in the house. (D. 20, 2, 7, 1; D. 20, 1, 32.)

In one respect this implied hypothec was peculiar. It did not prevent the manumission of any of the household slaves (D. 20, 2, 6), unless owing to arrears of rent steps had been taken to enforce the hypothec. (D. 20, 2, 9.) The proper mode was to send a public official to the premises to make an inventory, and put a mark on the property, after which the tenant could not deal with it. (D. 19, 2, 56; D. 47, 10, 20.)

2. RURAL HYPOTHEC was of a very different nature, and could not be made of the same extent as urban hypothec, except by special agreement. (C. 4, 65, 5.) But the landlord had an implied hypothec over the crops (*fructus*). (D. 20, 2,

7, pr.) The hypothec attaches to the crop (*fructus*) from the moment it is gathered.

3. A person that lent money expressly to rebuild a house, or paid the cost of rebuilding, had an implied hypothec over the house. (D. 20, 2, 1.) *

4. Pupils have a special hypothec over property bought by their tutors with their money. (D. 27, 9, 3; C. 7, 8, 6.) Justinian gave members of the corporation of bankers (*collegium argentariorum*) a special mortgage on immovables, bought by their clients with money advanced by them. (Nov. 136, 3.) But generally, a person with whose money anything was bought had no hypothec over it, unless by express agreement. (C. 8, 14, 17.)

B. In respect of what Obligations could a Hypothec be contracted?

Generally, it may be said, every obligation (*jus in personam*) could be reinforced by hypothecation, whether it were conditional or unconditional, and whether past, present, or future. (D. 20, 1, 5.) The obligation might be one that could not be given effect to by any action (*naturalis obligatio*), (D. 20, 1, 5), unless where the result would have been to evade a positive law, such as the *Senatus Consultum Macedonianum* or *Senatus Consultum Velleianum*. (D. 20, 3, 2.) The person that gives the hypothec need not be the debtor; any one may give a hypothec over his own property for an obligation incurred by another, whether that obligation was or was not incurred on his behalf. (D. 20, 1, 5, 2; D. 13, 7, 9, 1.)

c. What Rights may or may not be hypothecated.

The general rule was that whatever could be sold could be hypothecated, and what could not be sold could not be hypothecated. (D. 20, 3, 1, 2; D. 20, 1, 24.) Hence freemen, or *res divini juris*, could no more be hypothecated than sold. (C. 8, 17, 3; C. 8, 17, 6.) Also one that had a power of sale, although not owner, as a tutor or procurator, could hypothecate. (D. 13, 7, 11, 7; D. 20, 1, 11.)

What accedes to anything hypothecated falls under the hypothec, and is added to the security of the creditor. The creditor has thus the same rights over the children of a female slave as he has over the slave herself. (C. 8, 25, 1; D. 20, 1, 29, 1.) So a house built on hypothecated land is subject to the hypothec. (D. 13, 7, 21.)

DIVESTITIVE FACTS.

I. By the extinction of the obligation to secure which the hypothec was created. The obligation must be *wholly* extinguished before *any* portion of the hypothecated property can be reclaimed. (D. 20, 1, 19; D. 13, 7, 8; C. 8, 13, 1.) The creditor, as has been observed, could retain the property until all his expenses were paid (D. 20, 6, 1), and interest, if such had been included in the agreement. (D. 20, 1, 13, 6.) If the creditor refused payment, then by a proper tender of the amount due, *i.e.* by offering the money deposited in a sealed bag (*deponere consignatum*), the hypothec was released. (C. 8, 25, 2.)

II. By sale of the property hypothecated. Sale extinguishes the hypothec, but does not release the debtor, except in so far as the amount obtained sufficed. (D. 12, 1, 28.)

III. By voluntary release of the things hypothecated (*remissio pignoris*). A release of the creditor might be either express or implied. It was given by implication in numerous ways.

1. By accepting some other security; thus by agreeing that a surety should be taken instead of the pledge. (D. 20, 6, 5, 2.) If a landlord took a surety for the rent due by his tenant, he was held as giving up his implied hypothec over the produce of the farm. (D. 20, 6, 14.)

2. By consenting to the sale of the thing hypothecated (D. 50, 17, 158); unless the hypothec was expressly reserved. (D. 20, 6, 4, 1.) Subscribing the deed of sale, if the creditor knew what it was, afforded conclusive proof of his consent. (D. 20, 6, 9, 1.) The mere fact, however, of his knowing that the debtor sold the thing, did not show that the creditor consented (D. 20, 6, 8, 15), unless the sale had been duly advertised, and had taken place with his knowledge and without any objection; in which case his consent was presumed. (C. 8, 26, 6.)

Illustrations.

A creditor consents to the sale of a hypothec, if it brought 10 *aurei*. The debtor sold it for 5 *aurei*. As the terms of the consent were not complied with, the hypothec is not lost. On the other hand, if the creditor consents to sell it for 5 *aurei*, and it brought 10, the sale is final, and the hypothec at an end. (D. 20, 6, 8, 14.) If the consent was to a sale within a year, and the thing was sold after the year, the hypothec remained. (D. 20, 6, 8, 18.)

A thing is pledged to Sempronius, and afterwards to Titius. With the consent of Sempronius it is then pledged to Marcus. By this Sempronius loses his hypothec, and if Marcus did not specially bargain to take his place, Titius has priority to him. (D. 20, 6, 12.) But it is really more a question of fact than of law. Did Sempronius

intend to give up his hypothec, and did not Marcus intend to take his place? That is the question to be settled by the evidence in each particular case. (D. 20, 4, 12, 4.)

3. By returning the title-deeds of the property. (C. 8, 26, 7.)

4. By returning the thing pledged to the debtor, not merely for his use during the pleasure of the creditor (*precario*), but with the intention of releasing the pledge. (C. 8, 26, 9.)

IV. By merger (*confusio*). The hypothec is at an end when the debtor becomes the heir of the creditor, or the creditor acquires the ownership of the thing by purchase or otherwise. (D. 20, 6, 9, pr.)

Illustration.

Titius, the *bona fide* possessor of Stichus, pledges him to Maevius, and Maevius gives Titius the temporary use of the slave. Then Gaius, the true owner, dies, leaving Maevius his heir. The hypothecation is at an end, and only the holding at will (*precario*) exists. (D. 13, 7, 29.)

V. Destruction of the thing hypothecated. If the thing pledged perishes, necessarily all rights in respect of it are at an end. (D. 20, 6, 8.) But the hypothec of raw material was considered to be terminated if that material was converted into a manufactured article; and hence it was usual to insert words to cover the event of specification (*quaeque ex silva factu natae sunt*). (D. 13, 7, 18, 3.) But a mere change in a thing (*mutatio rei*) did not terminate the hypothec. If a house were removed, the ground was still subject to the hypothec (D. 20, 1, 29, 2); or if uncultivated ground were made a vineyard or built upon. (D. 20, 11, 16, 2.)

VI. Prescription. The right *in rem* of the creditor was lost if the thing mortgaged were possessed *bona fide* by any one (other than the debtor or his heir) for the usual period of ten or twenty years. (C. 7, 36, 1; C. 7, 36, 2.)

REMEDIES.

A. In respect of Rights *in rem* of Creditor.

I. To obtain possession of the thing hypothecated.

The *actio Serviana* (and also the *quasi-Serviana*, called also *hypothecaria*, for enforcing mortgages), owes its existence to the Praetor's jurisdiction. By the *actio Serviana* a man tries a suit as to the goods of a *colonus* (tenant-farmer) that are held by him as a pledge for the rent of the lands. By the *quasi-Serviana* again, creditors follow up their pledges or mortgages. (J. 4, 6, 7.)

1. This action was *in rem* for the recovery of the thing hypothecated from the debtor, or from any third person having possession of it. (C. 4, 10, 14.)

2. Like other actions *in rem*, it may be brought by the heirs of the creditor. (D. 13, 7, 11, 4.)

3. When the defendant is the debtor, he cannot require the creditor first to sue himself or the sureties for the debt (C. 8, 14, 24); but when another had possession, he could, under the later legislation of Justinian, require the creditor to proceed first against the debtor and his sureties (*beneficium ordinis s. excussionis*). (Nov. 4, 2.)

4. Prescription (negative). This action could be brought against *mala fide* possessors up to thirty years (C. 7, 39, 7, pr.), and prior to A.D. 525, against the debtor and his heirs for ever. In favour of the latter, however, *Justinus* limited the *Actio quasi-Serviana* to forty years. (C. 7, 39, 71, 1.)

II. Possessory remedies.

1. Interdicts for retaining and recovering possession.

2. *Interdictum Salvianum* and *Quasi-Salvianum*, for acquiring possession. These interdicts correspond precisely to the *actio Serviana* and *quasi-Serviana*. They tested the question of possession as the other did of right. The *Salvianum* was given to the landlord, the *quasi-Salvianum* to any creditor. At first the remedy was confined to the debtor, and the interdict could not be brought against a third party, as when the debtor had sold the thing. (C. 8, 9, 1.) But it seems that even against a purchaser from a debtor, a *utile interdictum* could be brought. (D. 43, 32, 1, pr.) If there are two creditors having a right to the pledge, the proper remedy is the action, not the interdict. (D. 43, 32, 2.)

B. Rights *in personam*.

(a) Of the Debtor. *Actio pignoratitia directa*.

1. The object is to recover the thing pledged on payment of the debt, or, if it is sold, the surplus.
2. It is brought by the debtor or his heirs against the creditor.
3. The burden of proving the debt is on the creditor; of the payment of it, on the debtor. (C. 4, 24, 10.)
4. Prescription. No prescription avails against the debtor or his heirs if they are ready to pay the debt. (C. 4, 24, 12.)

(b) Of the creditor. *Actio pignoratitia contraria*.

The object is to enforce the duties owing by the debtor to the creditor.

BOOK II.

RIGHTS *IN PERSONAM.*

BOOK II.

RIGHTS IN PERSONAM.

First Division.

CONTRACT.

DEFINITION.

1. DEFINITION *per genus et differentiam*. Contract belongs to the division of rights *in personam*, and not to the division of rights *in rem*; and it consists of those rights *in personam* that arise from the acts of individuals, and not of those that arise by operation of law. A contract may be said to exist when one person voluntarily undertakes a duty or duties with the intention of thereby creating in favour of another a right or rights *in personam*. Rights arising from contract are therefore, in the first place, to be distinguished from rights *in rem*. This contrast is sometimes expressed in the Roman Law by the term "*obligatio*." "The essence of an *obligatio*," says Paul, "does not consist in this, that it makes a thing ours, or a servitude ours, but that it binds another to give something to us or do something for us."¹ Contract, therefore, is in the class of "*obligationes*."

The distinction between rights *in rem* and rights *in personam* has been already fully illustrated.

Rights *in personam* are divided into two classes—Contract and Quasi-contract. In the case of quasi-contract the person undertaking a duty either does not act voluntarily, or acts voluntarily, but without any intention of thereby creating a right *in personam* in favour of another.

¹ "*Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.*" (D. 44, 7, 3.)

Illustrations.

Titius gave Gaius 20 *aurei* upon an agreement that Gaius would return that amount at the end of a month. Titius has a right *in personam* to 20 *aurei* at the end of that period ; and this is a contract, because Gaius accepts the money with the intention of creating this right in favour of Titius.

Julius gives Maevius 20 *aurei* under the false impression that he owes him that sum. Maevius is bound to return the money ; but as this duty is not voluntarily undertaken by him, but imposed upon him irrespective of his will, his obligation falls under the class of quasi-contract. (J. 3, 15, 1 ; J. 3, 28, 6.)

Titius requests Gaius to watch his house during his absence from home. Gaius does so. The relation between Gaius and Titius is one of contract.

Julius goes away from home, leaving no one to look after his house. Bad weather comes on, and Maevius, to prevent the house being spoiled, enters and takes charge of it. Maevius acquires rights *in personam* against Julius, but as it is without the knowledge or consent of Julius, they belong to the head of quasi-contract. (J. 3, 28, 1.)

Stichus, in consideration of being manumitted, promises, in the customary way, to work for his master two days in every week. This is a contract, because the duty is voluntarily undertaken by Stichus, with the intention of giving his master a right to a portion of his services after manumission.

Sempronius manumits his slave Stichus. Sempronius falls into poverty, but Stichus prospers and amasses wealth. Sempronius has a right of maintenance from Stichus. Inasmuch, however, as this right does not arise from any promise of Stichus, but belongs to Sempronius in consequence of the manumission, it is of the nature of quasi-contract.

Titius, being compelled to go abroad, leaves an imbecile son in the charge of Gaius, who, as a recompense for his trouble, is allowed to take the rents of a farm. This is a case of contract.

Julius by will appoints Maevius *tutor* to his son. Maevius, having no legal ground of exemption, is compelled to accept the office. The rights of the son as against Maevius arise not from contract, but from quasi-contract. (J. 3, 28, 2.)

Julius in his Will said : " I give and bequeath my slave Stichus to Maevius." This is a direct bequest of the ownership, and therefore Maevius has a right *in rem* in respect of Stichus.

Julius in his Will said : " I charge my heir Sempronius to give my house at Capua to Maevius, and keep it in repair." This gives Maevius a right *in personam* in respect of the house and repairs ; but as Sempronius is bound, not by his own will, but by the directions of Julius, the right of Maevius arises from quasi-contract. (J. 3, 28, 5.)

2. Analytical definition. The following is the definition given in the Indian Code. (Act No. IX. of 1872, § 2.)

When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.

When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.

Every promise and every set of promises forming the consideration for each other is an agreement.

An agreement enforceable by law is a contract.¹

The Institutes contain no definition of *contractus* nearer than the following definition of "*obligatio*."

Let us now pass to obligations. *Obligatio* is a legal bond that ties us down so that we must needs do something, according to the laws of our State. (J. 3, 13, pr.)²

Adstringimur—"we are bound." An obligation is something that binds a specified person or persons. This is an essential element of a right *in personam*.

Alicujus solvendae rei.—Elsewhere the place of the word *solvere* is taken by three words—*dare, facere, praestare*. *Solvere* was perhaps intended to be substituted as a generic term for those three words; but if so, the selection was not happy. It leads almost inevitably to the tautological language of Theophilus (*καταβαλεῖν τὸ ἐποφειλόμενον*), to pay a debt, thus introducing in the definition the very word to be defined. Moreover, *solvere* is a technical term in the Roman Law, designating one particular mode of terminating an obligation (*solutio*); and it is not well to describe the general object of obligation by a word employed usually for a specific divestitive fact. The intention of the Institutes doubtless is to describe in the most general language the objects of an obligation, and these are either acts or forbearances. The sphere of obligations cannot be made narrower. For an obligation or *jus in personam* differs from *jus in rem* in this respect, that the duties corresponding to it may be, and most commonly are, positive, whereas rights *in rem* imply duties that are wholly negative, consisting wholly of forbearances.

The expressions *dare, facere, praestare*, given by Paul (D. 44, 7, 3), are taken from the forms of actions in Roman procedure. An action *in personam* was an action to enforce a *jus in personam* (leaving delicts out of account), and the *intentio* of the formula stated that the defendant ought to give, do, or make good (*dare, facere, praestare*). (G. 4, 2.) In some actions the word "give" alone was used (*si paret eos dare oportere*) (G. 4, 41); in others, both to "give" and to "do" (*quidquid paret Numerium Negidium Aulo Agerio dare, facere, oportere*) (G. 4, 47); while in other cases *praestare* seems to have been employed.

Dare has two different meanings. (1.) In its strictest technical sense it means to convey property so as to make the receiver a true owner.³ This was the meaning ascribed to it when used in the ancient, formal contract of *stipulatio*. (D. 45, 1, 75, 10.) (2.) Often, however, *dare* signifies that the possession of the thing merely, and not the ownership, must be delivered. The obligation of a seller, in the contract of sale, was only to deliver the thing, not to make a good title to it. These two meanings coincide with the distinction between *dominium* and *possessio*.

Facere is a general term, often including *dare*. (D. 50, 16, 218.)⁴ It is even used

¹ *Conventio* is nearly equivalent to "agreement" in the above definition. (D. 2, 14, 1, 3.)

Contractus is a *conventio* enforceable by law; but some *conventiones* enforceable by law were called *pacta legitima*, or *pacta praetoria*.

Pactum or *Pactio* is any agreement other than *contractus*.

Pollicitatio is a proposal not accepted—as, for example, a vow. (D. 50, 12, 3.)

² *Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura.*

³ *Non videntur data, quae eo tempore quo dantur accipientis non sunt.* (D. 50, 17, 167.)

⁴ *Verbum facere omnem omnino faciendi causam amplectitur dandi, solvendi, numerandi, judicandi, ambulandi.*

when *dare* would seem to be the better word, as when one is obliged to give up a thing deposited with one for safe keeping. (D. 50, 16, 175.) In the *formulae*, when a definite sum was demanded, *dare* seems alone to have been used; when a sum not ascertained was demanded, then *facere* was added. An obligation may be not to do (*non facere*). The most common example is when a person undertakes not to sue for a debt. (D. 45, 1, 75, 7.)

Praestare does not occupy so distinguished a place in the *formulae*. It is found, according to Savigny, in the *formulae* in actions for delicts, as signifying to make good any damage or loss. Von Vangerow suggests that it was the word employed in a certain kind of equitable actions (*actiones in factum praescriptis verbis*), to which the words of the old *formulae* did not apply. For the purpose, however, of the definition of obligation, it is tautological. All that is wanted is a term for acts and forbearances, and the best phraseology would have been to say that all obligations consist in *faciendo* (acts), or in *non faciendo* (forbearances).

The expressions already quoted exhaust all that is really essential to a definition, but there remain several phrases in the text too remarkable to be passed over without notice.

Juris vinculum.—The nature of an obligation, as a tying of two persons together, is deeply fixed in Roman Law. It is implied in the old contract of *nexum*.

Necessitate.—This means that it has not been left to the free choice of the promiser whether he will do what has been agreed upon or not. A debtor is one from whom money can be exacted against his will.¹

Titius has sold a slave to Gaius, but on the understanding that either party may withdraw from the bargain. There is no obligation between them, as Titius is not bound to deliver the slave unless he pleases. (C. 4, 38, 13.)

Titius sold a slave to Gaius subject to the condition that the slave's accounts should be satisfactory (*si rationes domini computasset arbitrio*). If this were understood to mean to the satisfaction of the arbitrary will of the master, there was no obligation; but the jurists held that the meaning was, if the accounts would satisfy a just man (*arbitrio boni viri*), and if the accounts were such as ought to be accepted, the sale was valid; otherwise not. (D. 18, 1, 7, pr.)

Naturalis obligatio.—An agreement that could not be enforced by action, but was not in other respects destitute of legal effect, was a *naturalis obligatio*. The special importance of such agreements in the Roman Law was due to the manner of its development. The law of contract, like the other departments of Roman Law, seems to have had originally a narrow basis. The steps by which it was widened will hereafter be stated; but after all the innovations of Praetors and Emperors, there remained a considerable number of agreements, even in the time of Justinian, quite meriting legal recognition, but for which no action was provided. With regard to them a middle course was adopted. The agreement could be used as a defence, or as a basis for other agreements enforceable by action. Numerous instances will occur in the course of the exposition: it will suffice at this stage simply to enumerate the legal effects of a *naturalis obligatio*.

1. If anything due by a simple *naturalis obligatio* were voluntarily paid by the debtor, he could not demand it back by the *condictio indebiti*, on the allegation that it was not due. (See Div. II. *Condictio Indebiti*.)

2. Although no action could be brought upon a *naturalis obligatio*, yet it could be used as a set-off. (Book IV. Proceedings *in jure*. *Formula System*.)

3. A *naturalis obligatio* could be the basis of an accessory contract. (See Accessory Contracts, *postea*.)

4. A *naturalis obligatio* sufficed to support a mortgage. (See p. 273.)

¹ *Debitor is intelligitur a quo invito exigere pecunia potest.* (D. 53, 16, 108.)

In those cases the surety could be sued, and the rights of mortgage enforced, although the original debtor could not be sued.

5. A *naturalis obligatio* could be the foundation of a *novatio*. (See Subdiv. II. Transvestitive Facts.)

REUS, CREDITOR, DEBITOR.

The word "*obligatio*" applies equally to both the parties—to him that enjoys the right as well as to him that is subject to the duty; thus we find such language as acquiring an obligation. (D. 45, 1, 126, 2; D. 23, 3, 46, pr.) In modern times, however, the tendency has been to confine "*obligatio*" to the side of the debtor, and to speak of the creditor's interest as *jus* or right. In the English language, obligation has the one-sided meaning, and applies exclusively to the debtor.

Agreeably to this use of *obligatio*, we find that originally there was only one name (*reus*) for the promiser and the person to whom the promise was made. This term indicated the plaintiff and defendant in an action, making no distinction between them. (Fest. v. *Reus*, p. 273.) Afterwards "*actor*" came into general use for the plaintiff, "*reus*" continuing to designate the defendant. In like manner *reus*, as the name of a party to an obligation, was qualified. *Reus promittendo* or *promittendi* was the name of the promiser, the person subject to the duty; *reus stipulando* or *stipulandi* was the name of the stipulator, the person to whom the promise was made, and who had the *jus in personam*. (Festus v. *Reus*, p. 273; D. 45, 2, 1.)

Creditor and *Debitor*.—These terms were at first confined to the case of loans (*pecunia credita*); but the necessity for finding suitable names for the parties to an obligation caused them to be extended. A *creditor*, therefore, became every person that could compel the performance of an obligation: a *debitor*, every person that could be compelled to perform an obligation. (D. 5, 1, 20; D. 50, 16, 11; D. 50, 16, 10; D. 50, 16, 108.) Hence a person to whom a wrong (delict) has been done is a *creditor* for damages or a penalty against the wrongdoer, who, in like manner, is a *debitor*. In the case of *naturales obligationes*, by a still further extension, the same words were employed in the same relative sense. (D. 46, 1, 16, 4.)

ARRANGEMENT OF THE SUBJECT.

Of all *obligationes* the chief division is into two kinds; Civil and Prætorian. The Civil are either established by statute, or at all events recognised by the *jus civile*: the Prætorian are established by the Prætor in the exercise of his jurisdiction, and are also called *honorariæ*. (J. 3, 13, 1.)

This distinction does not form the basis of any classification, but it runs throughout the whole Roman civil law.

Of *obligationes*, the chief division is into two kinds. For every *obligatio* arises either from contract or from delict. (G. 3, 88.)

Obligationes are next divided into four kinds,—from contract or from quasi-contract; from delict or from quasi-delict. (J. 3, 13, 2.)

This division has been criticised at length in the introduction, and rejected. Delict and quasi-delict are violations of rights *in rem*, and have been already described in their place; contract and quasi-contract constitute the two divisions of the class of rights *in personam*.

And first let us look at those that arise from contract. Of these there are four kinds. For contracts are made by acts (*re*), by words, by writing, or by consent. (J. 3, 13, 2; G. 3, 89.)

The classification of contracts given by Gaius and Justinian is based upon the

merest external characteristics, and fails altogether to indicate the juridical foundations of the contracts. Thus "consent" is named as the distinctive mark of one class of contracts; but in every contract there must be consent. There is also something more, and it is that something more that distinguishes one class from another. Thus, in formal contracts, the consent must be given in the form prescribed by law; in equitable contracts, in addition to consent, there must be performance by one of the parties; lastly, in the contracts said to be based on mere consent, an additional essential element was a valuable consideration.

An adequate discussion of this subject cannot, however, be attempted until the several contracts have been examined and described. But it is expedient in some slight degree to alter the order in which the several classes are taken.

FIRST PART.—ONLY ONE CREDITOR AND ONE DEBTOR.

First, FORMAL CONTRACTS.—This group includes perhaps the most ancient contracts of the Roman Law, and ought therefore to be taken first. It consists of those contracts whose investitive fact is a certain, more or less elaborate form. It includes two of the groups enumerated by Gaius and Justinian; namely, the contracts made by words, and those made by writing.

Second, EQUITABLE CONTRACTS.—These are of exclusively Praetorian origin, as the former belong entirely to the *jus civile*. It consists of the contracts made by acts or performance (*ex re*), and one of the contracts (*Mandatum*) included in the next group by the Institutes.

Third, CONTRACTS FOR VALUABLE CONSIDERATION.—This is the group erroneously described by Gaius and Justinian as based upon consent merely.

Fourth, History of the Roman contracts, with an argument for the classification above set forth.

Fifth, Equitable contracts omitted by Justinian.

Sixth, Contracts for valuable consideration omitted by Justinian.

SECOND PART. CORREALITY.—MORE THAN ONE CREDITOR OR DEBTOR.

THIRD PART.—ACCESSORY CONTRACTS.

This concludes the First Subdivision.

The Second Subdivision contains a statement of what is common to the several contracts. An examination of the special contracts shows that while they differ in their remedies, and rights, and duties, as well as the investitive facts, they agree in much that concerns the investitive, transvestitive, and divestitive facts. It is convenient, therefore, after considering what is peculiar to each contract, to treat of the rules applicable to all contracts.

SUBDIVISION I.

FIRST PART.—ONLY ONE CREDITOR AND ONE DEBTOR.

FIRST,—FORMAL CONTRACTS.

I.—*NEXUM*.

THE solemn transaction *per aes et libram*, which in its application to slavery, *patria potestas*, *manus*, and ownership, has been

already discussed, is found to occur in contract, and also in wills; so that there is no department of the substantive law in which it fails to occupy a conspicuous place. The fact is certainly noteworthy,—that by one single ceremony, although doubtless not with the same words, a man obtained a wife, bought his slaves, emancipated his children or delivered them up in bondage for their transgressions, gave away or acquired land, made contracts, and finally regulated the devolution of his property to his successors. But of all the uses of the form *per aes et libram*, that concerning contract is the one, not certainly of the least interest, but of which least is known. It is an undoubted fact that a right *in personam* could be created *per aes et libram*, but in what manner, and subject to what limitations, the sources do not enable us to say. Varro and Festus have preserved evidence of the bare fact, and Gaius, who gives us some information in respect of the divestitive facts of *nexum*, says nothing as to the way in which a contract *per aes et libram* could be made, nor what were the restrictions placed upon that mode of creating contracts. From what Gaius says of a release *per aes et libram* it may be confidently inferred that the *nexum* applied to something short of the class of fungible things. It applied undoubtedly to things that were dealt with by weight, also to things dealt with by number, if the amount was definite, but it was a moot point whether it applied to things that were dealt with neither by weight nor number, but by measure. (G. 3, 175.)

II.—STIPULATIO.

DEFINITION.

A contract made by words is formed by a question and an answer, when we stipulate that something shall be given us or done for us. The name stipulation is used, because *stipulum*, among the ancients, was a word meaning firm—itsself, perhaps, derived from *stipes*. (J. 3, 15, pr.)

The derivation of "*stipulatio*" given by Justinian is taken from Paul. (Paul, Sent. 5, 7, 1.) Festus attributes it to *stips* (whence *stipendium*), a small coin. A third derivation is stated by Isidorus (Orig. 5, 24, 30), from *stipula*, a rod. The theory of this derivation is, that it was customary in making a promise for the two parties to lay hold each of an end of a rod, and break it, so that by joining the broken ends together there would be evidence that some contract had passed between them. Such a usage is not unknown, but there does not appear to be any extrinsic evidence in support of it. The question of derivation is not altogether without interest historically. The ancient name of the verbal contract, always called *stipulatio* by the jurists, seems to have been "*sponsio*," and in the early history of the stipulation, "*spondeo*" was

the only word that could be employed with efficiency. Paul says that every stipulation was properly called *sponsio*. (D. 50, 16, 7.)

The person that asked the question, and to whom the promise was made, was called *stipulator*, anciently *reus stipulandi* or *reus stipulando*.

The person that made the promise was called *promittor*, anciently *reus promittendi* or *reus promittendo*.

1. The stipulation was a formal contract. A promise made in the form of question and answer had legal force: the same promise given without any previous interrogation did not create a legal obligation.

2. The stipulation was not confined to particular transactions, such as buying and selling, or hiring, or the like, but was *coextensive with the subject matter of contract*. It was not so much a contract as a universal form by which any promise could be made binding in law.

3. The stipulation was *unilateral*; that is, it imposed duties on the promiser, but none upon the person to whom the promise was made. It was therefore unsuitable to the case of *reciprocal* promises, where the promise of each party is the consideration for the promise of the other. Reciprocal promises could, however, be made by two independent separate stipulations.

4. The great utility of the stipulation is worthy of remark. No proof that any consideration was given for the promise need be given; the formal or solemn character of the promise was enough. At the same time, the interrogative form aroused the attention of the promiser; the question put showed very distinctly what he was to undertake, and his answer must be in precise language adopting the question.

RIGHTS AND DUTIES.

A. Duties of Promiser (*reus promittendi*)=Rights in *personam* of *stipulator*.

Nothing can be simpler than the duty of the promiser; namely, to do or to give what he promised to do or to give. No more precise account can be given. The only questions that arose under this head were questions of interpretation.

INVESTITIVE FACTS.

At this stage it is necessary to state only so much of the investitive facts as are special to stipulation; not those that the stipulation shares in common with all other contracts.

I. Form of stipulation, where only one thing is promised.

1. What words may be used in a stipulation?

The words formerly in traditional use were such as these : Do you undertake that it shall be given? I undertake it (*Dari spondes? Spondeo*). Do you promise? I promise. Do you pledge your credit? I pledge it (*Fidepromittis? Fidepromitto*). Do you become surety? I become surety (*Fidejubes? Fidejubeo*). Will you give it? I will give it. Will you do it? I will do it. (J. 3, 15, 1; G. 3, 92.)

But the obligation made by the words "*Dari spondes? Spondeo*," is peculiar to Roman citizens. The others belong to the *Jus Gentium*, and therefore hold good between all men, whether Roman citizens or aliens. And even though expressed in Greek, they hold good between Roman citizens if only they understand Greek; and conversely, though uttered in Latin, they hold good between aliens if only they understand Latin. But the former is so peculiar to Roman citizens that it cannot properly be even translated into Greek, although it is said to be fashioned after a Greek phrase. (G. 3, 93.)

Hence it is said that in one case an alien too can come under an obligation by using this word; if, namely, our Emperor were to ask the ruler of some alien people about peace in this way, "Do you undertake (*spondes*) that there shall be peace?" or were himself to be asked in the same way. But the saying is over subtle. For if the agreement is violated no action based on stipulation follows; but redress is claimed by the law of war. (G. 3, 94.)

Now, a stipulation may be entered on in Greek, in Latin, or in any other tongue; for it makes no difference, if only both parties understand that tongue. Nor is it necessary that both should use the same tongue; but it is quite enough if a suitable answer is given to the question. Moreover, two Greeks can contract in Latin; but, formerly, the formal words given above were used. Afterwards, however, a constitution by Leo (469 A.D.) was passed, which took away all verbal formalities, and required only that both parties should know what was meant, and agree in their understanding of the contract, no matter what the words in which it was expressed. (J. 3, 15, 1.)

That a dumb man can neither stipulate nor promise is plain; and this is held to apply to a deaf man too; for the stipulator ought to hear the words of the promiser, and the promiser the words of the stipulator. Hence it is clear that we are speaking not of a man that is very slow of hearing, but of one that cannot hear at all. (J. 3, 19, 7; G. 3, 105.)

The answer must, however, always be in spoken language. Thus :

S. Will you give (*dabis*)? P. Why not (*quidni*)?

This is a good stipulation, but if the promiser had answered only by a sign or nod, it would not have been a stipulation at all. (D. 45, 1, 1, 2.)

2. The question and answer ought to be consecutive; if anything intervene between them, there is no stipulation. (D. 45, 1, 137, pr.) The parties also must necessarily be within hearing distance of each other.

3. The question and answer must agree, but substantial agreement was enough, although the previous terms of the question were not repeated in the answer. (D. 45, 1, 12; D. 45, 1, 137, pr.) An advance is to be remarked between the time of Gaius and Justinian.

Again, a stipulation is void if the question and answer do not agree; as when a man stipulates that you shall give ten *aurei*, and you promise five; or *vice versa*. It is void too if he makes a simple stipulation, and you promise conditionally, or *vice versa*; if only you expressly say so; as when a man stipulates under a condition or for a particular day, and you answer, "I undertake for to-day." For if you were to answer only, "I promise," it would appear to be a briefly worded undertaking for the same day, or under the same condition; since it is not necessary in answering to go again over everything that the stipulator has expressed. (J. 3, 19, 5; G. 3, 102.)

Illustrations.

Stipulator. Will you give me 100 *aurei* before the Kalends?

Promittor. I will give you 100 *aurei* on the Ides.—This is void, because the promiser agrees to a longer time than is asked. (D. 45, 1, 1, 3.)

S. Will you give me 10 *aurei* on the Kalends of January or February?

P. I promise.—This is good for February, but not for January. (D. 45, 1, 12.)

S. Will you give me Stichus or Pamphilus?

P. I will give you Stichus. This is void, because it makes a simple categorical instead of a disjunctive promise. (D. 45, 1, 83, 2.)

S. Will you give me 10 *aurei*?

P. If my vessel arrives from Asia I will.—This is void. (J. 3, 19, 5; D. 45, 1, 1, 3.)

S. Will you give me 10?

P. I will give you 20.

S. Will you give me 20?

P. I will give you 10.

According to Justinian in the text, these promises are altogether void; but this decision conflicts with the text of the Digest. Generally the rule is laid down in regard to money, that the greater includes the less; and therefore, if one promises 20, the promise is good for 10, if 10 was asked. (D. 50, 17, 110; D. 45, 1, 83, 3; D. 45, 1, 1, 4.)

S. Do you promise to give 10 or 5?

P. I promise.—In this case, according to Pomponius, 5 will be due. (D. 45, 1, 12.)

II. Form of stipulation when more than one thing is promised.

Whenever several things are included in one stipulation, if the promiser answers simply, "I undertake to give," he is liable for all. But if he undertakes to give one of them, or several, then an obligation is contracted as regards those for which he has undertaken. For of the several stipulations only that one (or some) seem complete, since we ought to stipulate and to answer for each thing separately. (J. 3, 19, 18.)

Illustrations.

- S.* Do you promise to give Stichus and Pamphilus?

P. I promise Stichus.—This is held to be a good stipulation for Stichus. (D. 45, 1, 83, 4.)

S. Do you promise Stichus?

P. I promise both Stichus and Pamphilus. This is also good for Stichus. The question and answer are regarded as crowding two stipulations into one; and they are good so far as question and answer agree, bad in so far as they do not agree. (D. 45, 1, 1, 5.)

III. Written Stipulations.

A stipulation was essentially an oral contract. Nevertheless, when writing became a general accomplishment, it was usual to make a written record of every important transaction; and such writings necessarily carried great weight with judges. Ultimately, a written stipulation carried with it two great advantages: it fortified the two weak points of the stipulation. These weak points were (1) the necessity of proving the actual presence of the parties, and (2) of proving that the form of question and answer was observed.

1. A stipulation in writing was conclusively presumed to have been made in the interrogative form. (Paul, Sent. 5, 7, 2; D. 45, 1, 30; D. 45, 1, 134, 2; C. 8, 38, 1.)

If it is written in a legal document that a man has promised, this is held valid, just as if a question had first been put, and then he had answered. (J. 3, 19, 17.)

It seems that in agreements that were really not in the interrogative form, a custom grew up of affirming in writing that one put the question and the other the answer (*Rogavit Titius spopondit Maevius*); and it was held that upon such an agreement an action *ex stipulatu* could be brought, unless it was clearly proved to have been the intention of the parties that no stipulation should exist. (D. 2, 14, 7, 12.)

2. A stipulation in writing affords an almost conclusive presumption that the parties were both present. (C. 8, 38, 14.)

Again, an obligation made by words is void if formed between persons not present. But this furnished matter for lawsuits to contentious men who some time after perhaps denied such allegations, and contended that either they or their opponents were not present. A constitution of ours, therefore, written to the advocates of Cæsarea, was brought in to quicken the decision in such suits. By it we have provided that all such writings as bear on their face that the parties were present, are in any case to be believed, unless the party that employs such audacious allegations can show by the most unquestionable proofs, either in writing or by competent witnesses, that the whole of that day on which the document was drawn up either he or his opponent was elsewhere. (J. 3, 19, 12.)

REMEDY.

From this two actions proceed; a *condictio* if the stipulation is definite, an *actio ex stipulatu* if it is indefinite. (J. 3, 15, pr.)

1. The *condictio*, here referred to, has a history elsewhere to be described. It was introduced (or profoundly modified) by the *lex Silii* (B.C. 243 or 244), for the recovery of specific sums of money. A few years later (circ. B.C. 233) it was extended by the *lex Calpurnia* to the recovery of any specific thing. At a subsequent period, it was still further enlarged to include indeterminate objects; i.e., where the plaintiff did not demand a specific sum or thing, but in general terms "whatever the defendant ought to do or give" (*quidquid paret dare facere oportere*). When the object was specific, the

action was called *condictio certi*; when not specific, *condictio incerti*. Sometimes the latter was called *actio ex stipulatu*, as in the text.

2. When the claim is indeterminate, the measure of damages is the loss sustained by the plaintiff in consequence of the breach of the contract (*quanti actoris interit*). (D. 45, 1, 113, 1.) Of course, when a definite sum has been promised, that is the measure of damages. The time selected for the purpose of estimating the damages, was the last moment that was fixed for the performance of the promise (D. 42, 1, 11); and if no time were fixed, then the *litis contestatio*. The defendant had a right to perform his promise up to the *litis contestatio*, but if he performed it after that, was nevertheless condemned as if he had not. (D. 45, 1, 84.)

APPLICATION OF STIPULATIONS.

The stipulation was greatly resorted to as a convenient mode of making contracts by private individuals; but it was also extensively employed in judicial processes. This use of stipulations is worthy of notice. The Praetor, for example, instead of giving an order that a person should be responsible, if by the fall of his house his neighbour's property was injured, called upon the owner of the ruinous premises to promise that he would be responsible for any damage that might result. This procedure seems, at first sight, strange. Whether by the direct or by the circuitous process, the free will of the person bound was equally disregarded. He was no more at liberty to refuse to promise to be responsible, than he was to deny such responsibility if it were directly imposed upon him. But it is much easier to get a man to promise not to do some particular thing, than, when it is done, to acknowledge it to be wrong, or to give compensation. The real meaning of the institution of judicial stipulation is—the weakness of the executive. The sovereign goes so far as to make his subjects promise not to misbehave, but he is not strong enough to punish them for acts that they have not by implication themselves condemned.

Some stipulations are *judiciales*, some Praetorian; some are due to convention, and others are common, being Praetorian as well as *judiciales*. (J. 3, 18, pr.)

Stipulations due to convention arise by agreement between the two parties; that is, neither by order of the *judex* nor by order of the Praetor, but by agreement of those that make the contract. Of these there are as many kinds (I may almost say) as there are of objects of contracts. (J. 3, 18, 3.)

Judicial stipulations are really not contracts at all; they observe the forms but not the spirit of contract. (D. 45, 1, 52.)

Praetorian stipulations proceed from the simple duty of the Praetor; as, for instance, stipulations against doing threatened damage or for the payment of legacies. The term Praetorian ought to be taken so as to include those due

to the Aediles; for these too come from a magistrate's jurisdiction. (J. 3, 18, 2.)

1. *Stipulatio Damni Infecti*.—The object of this procedure, of which the stipulation was only a preliminary and not indispensable step, was to secure compensation for damage that might be done by a house falling down, or by any work or construction upon any land, public or private. (D. 39, 2, 19, 1.) The grant or refusal of the stipulation was entirely in the discretion of the Praetor, who paid regard to the probable injury that might be occasioned, and not to the question whether the petitioner was strictly a neighbour or not. (D. 39, 2, 13, 3.) If the threatened damage arises from anything on a man's own land, or on which he has a servitude, it is enough if he promises by stipulation; he need not give security; but if the damage is threatened by the act of a person not owner or *bona fide* possessor, he must also give sureties. (D. 39, 2, 30, 1; D. 39, 2, 13, pr.) The stipulation was usually made for a certain length of time, so that if no damage occurred within that time the promiser would be free. It was not considered fair that a promise of this kind should hang indefinitely over a man's head. (D. 39, 2, 13, 15.) But at the end of that time it could be renewed, if the Praetor thought fit. (D. 39, 2, 15, pr.)

A peculiarity of this judicial stipulation was that it availed not only against the promiser and his heirs (like contracts generally), but against every one that succeeded him in the ownership of the property in respect of which the stipulation was made. (D. 39, 2, 13, 16.) If the owner refused to make the stipulation, the petitioner was put in possession, that is, had custody only (*nuda custodia*) (D. 39, 2, 15, 20); but after a time he could apply for possession (*possidere*), such as would ripen by *usucapio* into ownership. (D. 39, 2, 15, 21.)

2. *Stipulatio legatorum servandorum causa* (for security of legacies).

This was a procedure analogous to the former. An heir that was bound to pay a legacy at a future day was compelled to promise by stipulation that he would meet the claim when due, and also to give sureties; if he could not or would not, the legatee was put in possession. (D. 36, 3, 1, 2.)

Stipulationes judiciales are those alone that proceed merely from the duty of a *judex*; as the giving security against fraud, or to follow up a slave that has taken to flight, or to restore his price. (J. 3, 18, 1.)

1. *Stipulatio de dolo*.—When a *bona fide* possessor was sued by the real owner, he was obliged, say in the case of a slave, to promise that he would not wilfully hurt the slave; more especially if, after the suit began, the period of *usucapio* elapsed, and the possessor, being technically owner, could manumit or pledge the slave. (D. 6, 1, 45; D. 6, 1, 18.)

2. *De persequendo servo restituendove pretio*.—Stipulation to pursue a slave or return his price.

A man dies bequeathing a slave to a legatee. Before the slave is delivered he runs away. If the heir was careless, he must pay the legatee the value of the slave; but if he was not in fault, then he simply promises, if the slave should be caught, to give him up, or pay his value. (D. 30, 1, 47, 2.) Gaius, however, in another passage (D. 30, 1, 69, 5), speaks as if the heir were bound to take active measures of pursuit.

Common stipulations are such as this—that the property of the *pupillus* shall be in safety. For both the Praetor and the *judex* (at times) order that such security shall be given if affairs cannot otherwise be cleared. Another instance is the stipulation that certain proceedings shall be ratified. (J. 3, 18, 4.)

1. Stipulation by Tutor. (See *Tutela*.)

2. *Stipulatio de rato* belongs to the subject of Procedure. [See Book IV.]

Dictio dotis.

The stipulation was not the only verbal contract recognised by the Roman Law, although it was immeasurably the most important. There were also the *Dictio Dotis* and the *obligatio operarum*.

Ulpian says a dowry (*dos*) could be given, or promised with or without stipulation. (*Dos datur, vel dicitur, vel promittitur.*) The same language is found in a constitution of Arcadius and Honorius (A.D. 396) preserved in the C. Th. 3, 12, 3, with the additional statement that this triple mode of constituting a *dos* was in accordance with the ancient law.

(1.) In the *dictio* there was no interrogation, and apparently no particular form of words.

(2.) Any one could promise a *dos* by stipulation, but certain persons only could use the *dictio*; namely, the woman about to be married, her father or other ascendant in the male line, or her debtor by her order. (Ulp. Frag. 6, 2.)

(3.) A stipulation might be conditional; the *dictio* could not be conditional nor suspended for a term (*non recipit diem vel conditionem*). (D. 23, 3, 48, pr.)

Obligatio Operarum was another verbal promise sanctioned by the law. An account of it will be found under the head of Freedmen (Div. II., *Libertini*).

III.—*EXPENSILATIO*, or *NOMINA TRANSCRIPTITIA*.

In the old times of republican simplicity, the Romans displayed a religious exactness in keeping their household accounts. The custom was to jot down each day the items of income and expenditure as they occurred (*adversaria*), and to transfer these once a month to a permanent book, called *Codex* or *Tabulae accepti et expensi*. (Cic. Pro. Rosc. Com. 1, 1.) The daily entries (*adversaria*) were made without order, and were soon rubbed out; the *codex* was well arranged, like a ledger. (Cic. Pro. Rosc. Com. 3, 6.) Whether the temporary entry in the day-book was sufficient to support an action on contract is not certain; but an entry in the *codex* charging another as owing a sum of money was a formal investitive fact, and gave the person making the entry a right *in personam* for the amount. It was not necessary that prior to the entry any sum should have been due; it was enough if the intending debtor consented to the entry. Theophilus gives us one form in which the entry was made.¹

The entry in the *codex* served the same purpose as the interrogative form in stipulation. It created a contract; it was not merely evidence that a contract existed. If an action were brought for the money, the judge could not go beyond the writing; if the sum were entered, it must be paid. Hence,

¹ "Centum aureos, quos mihi ex causa locationis debes, expensis tibi tuli? Expensis mihi tulisti."—(Theoph. ad J. 3, 21, pr.)

if, on the promise of a loan, an intending debtor allowed such entry to be made in the *codex* of his creditor, he could not refuse payment on the ground that he had never received the money. Writing that was mere evidence of a pre-existing contract was called *nomina arcaria*.

The case is different with the entries called *nomina arcaria*; for in them the obligation is made by acts (*re*), not by writing; since they hold good only if the money is actually counted out. This counting of the money makes an obligation *re*. We shall therefore be right to say that *arcaria nomina* do not make an obligation, but afford evidence that an obligation has been made. (G. 3, 131.)

Hence it is wrong to say that by *arcaria nomina* even aliens come under an obligation, for they come under it not by reason of the entry in itself, but because the money is counted out. This kind of obligation belongs to the *Jus Gentium*. (G. 3, 132.)

In the case put by Gaius, the obligation to restore the money lent, as will be seen presently, arose from the actual lending, and not from the written attestation; so that if the latter had not existed, the obligation would still have been perfect. It was usual to commit stipulations to writing in the time of Cicero (Top. 25; Rhet. 2, 9), but the obligatory force of the transaction was not altered. It was the stipulation that gave rise to the action, not the writing, which was merely evidence.

The question has been asked, whether an entry in the books of the creditor, without the knowledge or consent of the debtor, made an *expensilatio*? But the answer should not be doubtful. It is absurd to suppose that one man could make another his debtor by contract without his consent. If that had been allowed, it would have put all the honest men in Rome at the mercy of the knaves. There is no exception to the rule, that there can be no contract without consent. No doubt could exist upon this point, but for another and very different question,—Whether an entry in the books of the debtor similar to the entry in the books of the creditor was also necessary? Cicero says it was the practice for the debtor to make a corresponding acknowledgment in his own books, and adds it is not less base to refrain from entering what one owes to another, than it is to enter as due from another what is not due. The absence of such an entry in the books of a debtor deprived the creditor of the simplest and most conclusive proof of the debtor's assent. But he was not shut up to that; and if he could show by other evidence that the debtor had consented to the written entry, he was entitled to succeed

in his action. Cicero does not put the absence of an entry in the debtor's books higher; it is merely evidence worth little or much, according to the character of the alleged debtor.

The *Expensilatio* could not be conditional. It purported to be a statement of a sum *actually* due, and consequently the debt could not depend on the happening of any future event, or be suspended till a future day. (Vat. Frag. 329.)

If we had only the text of Gaius, a serious doubt would arise whether the *expensilatio* was really an original means of creating rights *in personam*, or only a mode of novation. (See *Postea, Novatio, Expromissio*.)

An obligation is made by writing, as in the case of transferred entries (*nomina transcriptitia*). Now a transferred entry is made in two ways, either from thing to person, or from person to person. From thing to person, if what you owe me by reason of sale, or hire, or partnership, I set down as paid out to you. From person to person, as when what Titius owes me I set down as paid out to you, supposing, that is, that Titius has offered me you as a debtor in his room. (G. 3, 128-130.)

If these were the only uses of the *expensilatio*, it would not rank as an original mode of creating an obligation. But a case related by Valerius Maximus (viii. 2, 2) shows that although perhaps it was usually employed for the purpose of novation, it was not always so. C. Visellius Varro, being dangerously ill, allowed a woman (Otacilia), with whom he had been living, to put down in her books a sum of 300,000 sesterces as due by him (*expensa ferri sibi passus est*), with the intention that if he died she should claim that sum from his heirs. Visellius recovered, and was sued by Otacilia for the money. C. Aquilius Gallus (Praetor, B.C. 65), after consulting with the leading men, refused the claim on the ground of immoral consideration (*libidinosa liberalitas*), not because there was no pre-existing obligation. This case shows that an obligation might be created by entry in the *codex*.

CHIROGRAPHÆ, SYNGRAPHÆ.—The *codex* was already becoming obsolete in the time of Cicero, and long before Gaius it had disappeared, except perhaps in the case of bankers or money-lenders (*argentarii*); and the *nomina transcriptitia* consisted of detached written affirmations and acknowledgments of debt.

A *Chirographum* was kept by the creditor only, and was signed by the debtor.

Syngraphæ were signed by both parties, and preserved for both.

These forms of contract were of Greek origin, as their names indicate. They were both in common use in the time of Cicero, and the *syngraphae* were known as early at least as the second Punic War (B.C. 210).

What, then, was the relation between the *codex* and the *chirographa* and *syngraphae* that coexisted with it?

The *codex*, like the *stipulatio*, originated in Roman customs; and therefore, like the *stipulatio*, it was confined to Roman citizens. But just as the *stipulatio* was extended by admitting new terms not consecrated by age for the exclusive use of citizens, such as *fidepromitto*, *fidejubeo*, *do*, *facio*, so the written contract was extended to aliens under a changed name. It was disputed whether aliens could use the *nomina transcriptitia*, and the utmost stretch of liberality was, that they might use them for *novatio* only, not for *expromissio*.

Whether aliens incur an obligation by transferred entries is justly questioned. For such an obligation seems in a way to belong to the *jus civile*; and so Nerva held. But Sabinus and Cassius thought that if the entry transferred is from thing to person, then aliens too are bound; but if from person to person, that they are not. (G. 3, 133.)

The aliens were, however, put on complete equality with citizens by borrowing from the Greeks the written contract common to them.

Besides, an obligation by writing can be made by bonds and indentures (*chirographa*, *syngraphae*); that is, when a man gives a written acknowledgment of the debt or promise to pay—provided, however, that this does not make a stipulation. This kind of obligation is peculiar to aliens. (G. 3, 134.)

It has been doubted whether by these *chirographa* a new obligation could be created, or whether they were simply written evidence of an existing contract. This latter view is inadmissible, unless we suppose that the language of Gaius is inaccurate. He assumes that there is only the writing, and not a stipulation; and that the writing alone sufficed to constitute an obligation. We may, therefore, regard the *chirographa* and *syngraphae* as the exact equivalents of the *nomina transcriptitia*; they were to aliens what the latter were to citizens.

The remedy of a creditor by *expensilatio* was the *condictio certi*.

CAUTIO.—Formerly an obligation was made by writing, or by entries (*nomina*), as the phrase was. But these entries are not now in use. Plainly, however, if a man gives a written acknowledgment of a debt, though the money has not been paid over, he cannot meet it by the plea (*exceptio*) that the money has not been paid, if a long time has elapsed. This has been settled very often. So it happens, as even at the present day, that he is bound by the writing, while he cannot complain; and from that writing arises a *condictio*, though there was no obligation made by words. By long time in this *exceptio* the imperial constitutions formerly understood any time running up to five years. But that creditors might not be too long exposed

to the chance of being defrauded of their money, a constitution of ours has narrowed the time, so that an *exceptio* of this sort cannot be brought after the lapse of two years at most. (J. 3, 21, pr.)

A *cautio* was merely a written acknowledgment of a loan, and was not conclusive of the receipt of the money by the borrower; and, what would scarcely be expected, the burden of proving the delivery of the money to the debtor rested entirely on the creditor, if the debtor denied the receipt. (C. 4, 30, 3; C. 4, 30, 1.) Justinian, however, in this respect, gave some compensation to the creditor by subjecting the debtor to a payment of twice the amount of the loan if he falsely denied his own writing or the receipt of the money. (Nov. 18, 8.) The *cautio* does not, therefore, rank as a literal contract; and Justinian rightly says that the literal contract did not exist in his day.

Was there any historical connection between the true literal contract (*expensilatio*, *chirographa*, or *syngraphae*) and the *cautio*? The point is obscure, but some light may be thrown upon it by considering what was the exact difference between *chirographa* and *cautio*. The essence of the chirograph was its constituting an obligation by its own inherent strength; the *cautio* was mere waste paper but for the pre-existing contract of loan, of which it was the evidence. The difference was great, but still there was an easy descent from the ancient to the modern form. After Aquilius' Praetorship a fraudulent chirograph was void. Thus, if a debtor were induced to give a chirograph to a person that alleged he had deposited money with another for his use as a loan, and no such deposit had been made, the chirograph would have been rendered worthless by the plea of fraud. If, however, the allegation of the creditor was not that he had deposited the money, but that he would do so, say the day after the chirograph was signed, it would probably have been difficult, if not impossible, to employ the defence of fraud. The difficulty of urging this plea lay in the fact that a chirograph was perfectly valid although there was no valuable consideration, and therefore the mere fact that the money had not been lent would not of itself have vitiated the obligation. Still, if a creditor did not give the money for which he had got a chirograph, and afterwards sued the debtor on the writing, he was dishonest, at least in bringing the action, if not in getting the chirograph. This seems recognised in a constitution of Antoninus (C. 4, 30, 3), who speaks of the plea of fraud

as substantially identical with the plea of *non numeratæ pecuniæ* (that the money had not been paid), (*exceptio doli seu non numeratæ pecuniæ*).

But in order to give complete protection to borrowers, it was necessary to give a remedy when the money had not really been lent, whether that was owing to the fraudulent intention of the lender or not. This was done by the *exceptio non numeratæ pecuniæ*.

The rule of law is the same, if a man, by pretending he will lend you money, makes a stipulation with you, and then does not pay the money. For that money he can certainly claim from you; and give it you must, since you are liable under your stipulation. But because it is unfair that you should lose your case on that ground, it is held that you ought to defend yourself by the *exceptio* that the money was not paid over. The time for this, as has been written in an earlier part of these books, has been narrowed by our constitution. (J. 4, 13, 2.)

Like all equitable innovations, the *exceptio non numeratæ pecuniæ* was regarded as an indulgence, and limited to loans of money; and at first it could be urged only within a year. The time was afterwards extended to five, but finally settled at two years by Justinian.

The *cautio* thus appears to have grown out of the *chirographa* by the admission within a limited time of the plea that the consideration for which it professed to be granted had not really been received.

It may be added that if the borrower paid interest or repaid any portion of the loan, he could not afterwards deny receipt of the amount stated in the *cautio*. (C. 4, 30, 4.) Justinian, moreover, extended the remedy beyond money lent—namely, to any *things* alleged to be given (*vel alia res datæ*), thereby considerably enlarging the scope of the *exceptio*, and enabling persons to contest their own written statements. (C. 4, 30, 14.)

SECOND,—EQUITABLE CONTRACTS.

The group of contracts said by Gaius and Justinian to be made *re* introduces a new class of considerations. An obligation arises, not from the observance of an ancient form, but from some act or fact. This fact, or *res*, consisted in the delivery by one person to another of some property, with the intention of imposing duties on the receiver. The formal contracts are the offspring of the *jus civile*; the contracts with

great infelicity called "real," were introduced by the Praetor on purely equitable grounds.

I.—*MUTUUM* (LOAN).

DEFINITION.

An obligation is contracted *re*, as by giving a loan (*mutuum*). Now a *mutui obligatio* arises when the things lent are weighed, counted, or measured, as wine, oil, corn, money, bronze, silver, gold. These we count, measure, or weigh, and so give them with the intention that they shall become the property of the receivers, and that at some future time we shall have returned to us, not the same things, but others of the same nature and quality. Hence comes the name *mutuum*, because I so give it you that from being *meum* it becomes *tuum*. From this contract arises the action called *condictio*. (J. 3, 14, pr. ; G. 3, 90.)

Mutuum is akin to *creditum*, from which it differs only as the species from the genus. (D. 12, 1, 2, 3.) *Creditum* includes other than fungible things. (D. 12, 1, 2, 1.)

RIGHTS AND DUTIES.

I. Duties of the Borrower.

In describing contracts limited to special subject-matter we find that the duties may be divided into two principal classes ; (1.) Those that are ascribed to the investitive facts, without special agreement. These are the normal rights and duties giving the special character to the contract. (2.) Those duties that do not regularly form part of the contract, but may be added to it by special agreement of the parties.

1. The receiver was bound to restore the same kind of things he received, equal in quantity and quality (D. 12, 1, 3); but not the identical things. Thus, if it was money, he must restore the same amount, but not the same coins. (Frag., Ulp., Inst. 3, 1.) If corn were given, the borrower must restore corn, not wine, or anything else of equivalent value. (D. 12, 1, 2.) From a text of Pomponius it would seem that the borrower usually promised to return as good as he got (*ut aequè bonum nobis redderetur*), but such a promise was taken for granted.

2. By special agreement the borrower might be required to pay interest, not exceeding the rate allowed by law, if an agreement were made by stipulation (*stipulatio*); or even, in a few exceptional cases, by words, without the interrogative form (*pactum*). (D. 22, 1, 30; C. 4, 32, 12; Nov. 136, 4.)

INVESTITIVE FACTS.—No contract of *mutuum* existed unless the things given were actually delivered to the borrower, or were in his possession before the contract. (D. 12, 1, 9, 9.)

The things must be made the property of the borrower; *i.e.*, he must have ownership (*dominium*), and not mere possession (*possessio*). Hence, an owner alone can give things by way of *mutuum*, although a mere possessor can give things so as to create other real contracts. (D. 12, 1, 2, 4.)

This contract might be conditional, like stipulation. (D. 12, 1, 7; D. 12, 1, 8.)

SPECIAL RESTRICTION ON MUTUUM.—Persons under *potestas* were prohibited from accepting a loan (*mutuum*) of money.

One peculiar reservation is made in regard to such persons; for the *Senatus Consultum Macedonianum* has forbidden loans to persons in the *potestas* of their parents. He that trusts them is denied an action, not only against the son or daughter, grandson or granddaughter, in person (and that whether still *in potestate*, or now become *sui juris* by the death of the parent or by emancipation), but also against the father or grandfather, whether he has the descendants still *in potestate* or has emancipated them. The reason of this provision by the Senate was, that often sons, loaded with debt for borrowed moneys, which they used to spend in extravagance, plotted against their parents' lives. (J. 4, 7, 7.)

This enactment passed, according to Tacitus, in the reign of Claudius (Ann. 11, 13), or, according to Suetonius, in the reign of Vespasian (Vesp. 11), derived its name either from Macedo, a well-known usurer; or from Macedo, a young debauchee, whose crimes had drawn the attention of the Senate to the perils arising from spendthrift children. The words of the enactment are contained in D. 14, 6, 1.¹ "It is determined that no one that has given money on loan to a *filiusfamilias*, to be paid even after the death of the parent in whose power he is, shall be given any action or claim, that so these money-lenders of the worst sort may know that no *filiusfamilias* can contract a debt that will be good in the event of his father's death."

In form it did not make the loan *null and void*, but only refused an action to the lender. Hence, if the loan were repaid without action brought, the money could not be recovered on the plea that it was not due. (D. 12, 1, 26, 9.)

The Act applied to loans of money, but in other respects left the capacity of persons under *potestas* to contract perfectly unrestricted. Thus, a son could buy or sell, or let or hire, and if the obligations so arising were changed into a loan (*mutuum*),

¹ "Placere ne cui, qui filiofamilias mutuum pecuniam dedisset, etiam post mortem parentis ejus cujus in potestate fuisset actio petitioque daretur: ut scirent qui pessimo exemplo fenerarent, nullius posse filiofamilias bonum nomen expectata patris morte fieri."

it was still valid (D. 14, 6, 3, 3), unless the sale or hiring were merely a pretext to evade the statute. (D. 14, 6, 7, 3.)

• *Exceptions.*

(1.) A son (*filiusfamilias*) could borrow upon his *peculium*, and to the extent of it, without exposing himself to the disabilities of the statute. The statute prevented him borrowing upon the strength of his expectations from his father. (D. 14, 6, 1, 3; D. 14, 6, 2.)

(2.) The loan was valid if it were contracted with the father's consent (D. 14, 6, 12; C. 4, 28, 4), or received his subsequent ratification. (C. 4, 28, 7.) If the father paid any portion of the loan, his consent was conclusively presumed. (D. 14, 6, 7, 15.)

(3.) When the loan was made for the benefit of the father's estate; *i.e.* if it was made by the son with the intention of making his father the real debtor. (D. 14, 6, 7, 12.)

(4.) When the loan was proper or necessary.

A son, being abroad, could borrow to pay such things as his father was accustomed to allow him for his education or official duties. (C. 4, 28, 5.)

A son might also borrow to pay a legal debt. (D. 14, 6, 7, 14.)

(5.) The loan was valid also when the lender was mistaken or misled as to the status of the borrower, provided the mistake was such as a reasonably careful man might make, and was not an error in law. (D. 14, 6, 3.) If the borrower declared he was a *paterfamilias*, it was enough (C. 4, 28, 1), unless the lender either knew or might have known that he was not. (D. 14, 6, 19.)

REMEDY.—The *condictio certi*, sometimes called *actio mutui* (C. 7, 35, 5), or *condictio ex mutuo*, was the remedy. (C. 4, 2, 7.)

MARITIME OR COMMERCIAL LOANS.

DEFINITION.—*Pecunia trajectitia* is money lent with which merchandise is bought and shipped at the risk of the lender, until the goods arrive at the port of destination. (D. 22, 2, 1.) It is a loan of money, (1) to be converted into goods (2) that are to be sent across sea (3) at the risk of the lender.

RIGHTS OF BORROWER.—1. The borrower was not bound to repay the loan, unless the goods arrived safely at their destination (D. 22, 2, 3; C. 4, 33, 4); or unless they were lost by

other perils than the perils of the sea; as, *e.g.*, if they were seized by the exchequer as illicit. (C. 4, 33, 3.)

2. The interest was not limited. (Paul, Sent. 2, 14, 3.) Latterly, however, Justinian fixed a maximum of 12 per cent. per annum. (C. 4, 32, 26.)

3. Usually the borrower was, by special agreement, bound to pay the expenses of a slave sent to collect the money if it were not repaid within the time fixed. To prevent disputes, it was usual to fix the sum *per diem* to be paid to the slave. (D. 22, 2, 4, 1.)

II.—*COMMODATUM* (GRATUITOUS LOAN).

DEFINITION.

Again he to whom anything is given to be used, that is lent free, comes under an *obligatio re*, and is liable to an *actio commodati*. But he differs widely from a man that has received a loan (*mutuum*); for the thing is not so given him as to become his, and therefore he is bound to restore the actual thing itself. . . . A thing is understood to be lent free strictly only if the thing is given you to be used without any reward being received or fixed. But if it is otherwise, and a reward comes in, then the use of the thing is let out to you (*locatur*); for a free loan (*commodatum*) ought to be gratuitous. (J. 3, 14, 2.)

Commodans or *commodator* is the person that lends the thing.

Commodatarius is the borrower.

The *commodatum* is of Praetorian origin. The edict runs thus: "The Praetor says, If it is alleged that a man has lent another anything free, I will give him a remedy therefor."

As *commodatum* consists in the use of a thing, there could with propriety be no *commodatum* of things consumed in the use. But such articles might be given for the sake of show, not to be used and consumed (D. 13, 6, 3, 6); and even money might be lent for the purpose of a sham payment. (D. 13, 6, 4.)

Usus and *Commodatum*.—In what respect does *commodatum*, which here appears among contracts, differ from *usus*? In one respect they resemble each other. Both are gratuitous; both imply the absence of consideration for the use. But the differences between them are sufficiently marked to justify the arrangement of the Institutes.

We may, however, premise what is *not* the difference. The term of the edict was not "*uti*," but "*commodare*." Labeo said *use* (*usus*) was the genus of which *commodatum* was the species: that use applied both to moveables and immoveables, while *commodatum* applied only to moveables. But this distinction Cassius denied; and Ulpian agrees with him; adding that even a dwelling-house might be the object of a *commodatum*. (D. 13, 6, 1, 1.)

Both *usus* and *commodatum* effect a separation between the ownership and the actual enjoyment of property; but in *usus* the separation is serious, and lasts generally for the life of the usuary; in the case of *commodatum* the use is more limited and temporary. The usuary had rights *in rem*; he could sue the thief, or any one that did damage. A borrower (*commodatarius*) could not sue the person that damaged the article borrowed (D. 9, 2, 11, 9); and although he could sue the thief that stole it, yet,

¹ *Ait Praetor*: "*Quod quis commodasse dicetur, de eo iudicium dubo.*" (D. 13, 6, 1.)

under Justinian, this was entirely in the option of the owner. The *commodatarius* had not even interdict possession. (D. 13, 6, 8.)

Still more striking is the difference in the investitive facts. *Usus* was created by testament, by *mancipatio*, by *in jure cessio*—all recognised modes of creating ownership. But *usus* could also, as we have seen, in certain cases originate in contract. Is it not the same with *commodatum*? There is a difference in the kind of contract. Whether the *usus* arose from stipulation or not, it certainly arose from a *promise*; but the right of the *commodatarius* begins from the *delivery* of the thing; until that time he has no right whatever.

The external marks correspond with a more essential difference; in *usus*, the law looks to the interest of the usuary; in *commodatum*, to the interest of the lender. There could be no greater mistake than to suppose that the law interfered on behalf of the borrower (*commodatarius*). It does not compel a man to give a loan of anything he has promised: it has no intention of beneficence towards the borrower (for it must be borne in mind, the *commodatum* is gratuitous); but when a lender has entrusted anything to a borrower, the Praetor requires that he shall not abuse the confidence reposed in him, but that he shall return the property safe and sound. This was the primary object of his intervention. The *commodatum* is, therefore, in its original scope, a unilateral contract; it imposes duties on the borrower, but none, in the first instance, upon the lender. But the Praetor having once intervened, could not stop there. The borrower might have been put to great and unexpected expense, and it would not be fair to compel him to return the property without giving him compensation. The lender must not expect the equitable intervention of the Praetor, unless he was prepared to "do equity" as well as to receive it. Thus, incidentally, the lender might be subject to duties as well as the borrower; but the duties of the borrower exist in every case; the duties of the lender are occasional, accidental, and indirect. This, then, is the first example of a departure from the strict unilateral contracts of the civil law: for even the "*mutuum*" was purely unilateral. It is a contract unilateral in its origin and scope, but which may, in consequence of circumstances that arise, become bilateral.

RIGHTS AND DUTIES.

I. Duties of the *commodatarius* = Rights *in personam* of *commodator*.

1. To return the thing lent in as good condition as he received it, excepting ordinary tear and wear.

Illustrations.

A horse is lent for a journey, the length of which is known to the lender (*commodans*). The distance is too great, and the horse is hurt. The loss falls on the lender. (D. 13, 6, 23.)

A horse is lent to go to battle, and is killed. The owner has no claim against the borrower (*commodatarius*). (D. 13, 6, 5, 7.)

2. To use the thing for the use agreed upon. It is theft, as already explained, if the borrower fraudulently procures the loan of a thing for one purpose intending to use it for a different one, or to use it in a manner that he knows the lender would never have permitted. (J. 4, 1, 6.)

3. The borrower must take as good care of the thing lent as

a good *paterfamilias*, in the absence of any special agreement. (C. 6, 43, 1; D. 13, 6, 5, 7; D. 13, 6, 23.)

He that has received a loan, if by any chance mishap he loses what he received—by fire, for instance, or the fall of a house, or shipwreck, or the onset of robbers or foes—none the less still remains under the obligation. But he that has received a thing to use is in a different position. Undoubtedly, indeed, he is compelled to show all possible diligence in guarding it; and it is not enough for him to employ all the diligence he usually employs in regard to things of his own, if another person of greater diligence could guard the thing safely. But for force too great for him, or for the like mishaps, he is not liable, if only it was not by any fault of his the mishap occurred. But otherwise, as if you choose to take what is lent you free from home with you and then lose it by the onset of foes or robbers or by shipwreck, there is no doubt you are bound to restore it. (J. 3, 14, 2.)

The borrower, in the case of *mutuum*, became owner of the thing lent. He was bound to restore not what he received, but only the same kind of thing in quantity and quality. His obligation, therefore, did not depend on the fate of the things committed to him. These he could use or destroy as he pleased. But the *commodatarius* is not owner of the thing lent to him: he has only the custody and the use of it, and according to the usual rule, accidental loss should fall not upon him, but upon the owner.

Illustrations.

Titius borrows plate from Gaius, saying he means to use it for a supper to be given to his friends. He takes it on a journey. The plate is stolen by robbers. Titius must pay Gaius the value of the plate. (D. 41, 7, 1, 4.)

Loss by theft was considered to show a want of due diligence; and accordingly if the thing lost were stolen (even if by the slave of the lender), the borrower was obliged to make good the loss. (D. 13, 6, 21, 1.)

Was the borrower of a slave liable if the slave ran away? This question, we are told, gave rise to much controversy. In some cases the liability of the borrower was beyond dispute, as when the slave was kept in chains, or so young as to require looking after, or the borrower had specially agreed to watch him. (D. 13, 6, 5, 6.)

Exception.—The borrower was required to take good care, as nothing more than a just return for the gratuitous benefit conferred upon him. (D. 13, 6, 5, 2.) Accordingly, when the lender also derived a benefit from the contract, a less degree of care was required.

Illustrations.

Two friends agree to give a joint supper—one taking the charge, and the other supplying the plate. Gaius says in this case it was an opinion of some jurists that the friend in charge was responsible only for wilful misconduct (*dolus*), not for the want of ordinary care (*culpa*); but Gaius thinks that he might be made liable as far at least as a husband was for his wife's *dos*; i.e., not for the care of a *prudent man* (good *paterfamilias*), but only for such as he took of his own affairs. (D. 13, 6, 18, pr.)

A man gives dresses to his betrothed in order that her appearance may be creditable to him. In this case, if the match goes off, and the dresses have to be returned, the betrothed is responsible only for wilful mischief (*dolus*), because the dresses are given as much for the glory of the intending husband as for her gratification. (D. 13, 6, 5, 10.)

II. Duties of *Commodator* = Rights in *personam* of *Commodatarius*.

1. The lender is bound to suffer the borrower (*commodatarius*) to enjoy the use of the thing according to the terms of agreement. (D. 13, 6, 17, 5.) This obligation, it must be remembered, arises only when the thing has been delivered to the borrower.

Illustrations.

Titius lends to Gaius tablets (*pugillares* or *codex*) in order that a debtor of Gaius' may give him a written security. Titius cannot demand back the tablets until the security is discharged. The reason is that it would be inequitable. If Titius had refused the tablets, another might have given them, or witnesses might have been procured. (D. 13, 6, 5, 8.)

Upon the same principle, if Titius gave Gaius a loan of wood to repair his house, he cannot take it away until the house falls down. (D. 13, 6, 17, 5.)

2. The lender must pay any extraordinary expenses incurred in preserving the thing lent. Thus the money spent on a sick slave, or to catch a runaway slave, must be paid by the lender. (Paul, Sent. 2, 4, 1.) But ordinary expense, which is the natural equivalent for the use of the thing, must be borne by the borrower. The borrower must, therefore, pay the food of the slaves, and even expenses for illness, if they are small in amount. (D. 13, 6, 18, 2; Mos. et Rom. Legum Collat. 10, 2, 5.)

3. If the lender has knowingly given in loan, and the borrower unwittingly received, things mischievous or unsuited to the purpose for which they were lent, he must pay any damage that may result.

Illustrations.

Titius supplies Gaius with rotten wood to repair his house, and the house falls down. Titius must make good the loss. (D. 13, 6, 17, 5.)

Julius lends vessels to hold wine or oil, knowing that they are leaky or will spoil the liquor. Julius must pay the value of the wine or oil so destroyed or lost. (D. 13, 6, 18, 3.)

Maevius gives to Sempronius the loan of a thieving slave, who steals from Sempronius. Maevius must make good the loss if he knew, and Sempronius did not know, the slave's character. (D. 13, 6, 22.)

INVESTITIVE FACTS.

As in *mutuum*, the rights and duties of *commodatum* arise from the delivery of the thing to the borrower. The borrower is not owner, and has not even *possessio*. (D. 13, 6, 8; D. 13, 6, 9.) Hence a person not owner—even a thief or robber—can give a thing in *commodatum*. (D. 13, 6, 15.)

REMEDIES.

I. To enforce the duties of the *commodatarius*.1. *Actio commodati directa*.

This is an action *bonae fidei*. (See Book IV. as to meaning of *actio bonae fidei*.)

If the defendant has lost the thing without blame, he may be required to give security to deliver it up if it should again come into his possession. (D. 13, 6, 13.)

II. To enforce the duties of the *commodator*.1. *Actio commodati contraria*.

At present no more need be said upon this, than that everything that forms a ground for the *actio contraria* is a good defence to the *actio directa* (D. 13, 6, 18, 4); and that, like other *contrariae actiones*, it can be brought, although the *actio directa* may not have been called into exercise. (D. 13, 6, 17, 1.)

2. *Actio utilis commodati contraria*.

This is to enforce restitution when the lender has carried off the thing lent without the knowledge of the borrower, and has sued the borrower and made him pay the value of it. This action is to compel the lender to restore the price so unjustly obtained. (D. 13, 6, 21.)

III.—*DEPOSITUM* (DEPOSIT).

DEFINITION.

This is a contract in which one person (*depositor*) gives another (*depositarius*) a thing to keep for him gratis, and to return it on demand. (D. 16, 3, 1, 8; D. 16, 3, 1, 45.)

This contract is distinguished from *mutuum*, because the ownership of the thing is not transferred, but both ownership and possession remain with the depositor. (D. 16, 3, 17, 1.) It is distinguished from *commodatum* because the receiver is not allowed to use it.

Illustrations.

Titius deposits with Gaius 10 *aurei*, giving him permission to use them if he pleased. Until Gaius actually did use the money, the contract remained one of deposit simply. (D. 12, 1, 10; D. 16, 3, 1, 34.)

Julius deposits with Maevius 10 *aurei*, and afterwards gave Maevius permission to use them. If Maevius accepts this permission, the contract is changed at once into *mutuum*, although he does not actually use the money. (D. 12, 1, 9, 9.) The consent of both parties is required to make a contract. If, then, Gaius accepts a thing on deposit, on the condition that if he should wish to use it he may do so, the agreement is understood as simply giving him power to convert the contract into loan at his own pleasure. On the other hand, when permission is afterwards given and accepted, the contract is at once changed, because an agreement for use, without actual use, suffices to make a *commodatum*.

The contract of deposit belongs to the *Jus Gentium*. The words of the edict are:—

The Praetor says: "If a deposit is made not in consequence of a sudden outbreak, or fire, or fall of house, or shipwreck, the remedy shall be for the loss simply. But if in consequence of the events above named, double, if the action is brought against the deposittee in person. If it is brought against his heir, and it is affirmed that the loss

was due to wilful wrongdoing of the deceased, the remedy shall be for the loss simply ; but if of the heir, for double the amount.”¹

When the deposit was made in consequence of fire or shipwreck, &c., it was said to be made from compulsion or distress (*necessarium, miserabile*).

RIGHTS AND DUTIES.

I. Duties of *Depositarius* = rights in *personam* of *depositor*.

A. In the Absence of Special Agreement.

1. To keep the thing safe.

He is liable only for acts of wilful fraud ; but on the score of fault—that is, of sloth or negligence—he is not liable. He is not answerable, therefore, although, through his want of diligence in guarding it, the thing is lost by theft. For he that gave a negligent friend a thing to guard, ought to ascribe the loss to his own easy-going ways. (J. 3, 14, 3.)

The contract of deposit is for the benefit of the *depositor* alone, and therefore the *depositarius* is responsible only for wilful destruction of the thing or extreme negligence. The reason mentioned by Justinian can hardly be supported, because in *mandatum*, which was a gratuitous contract, and in some respects scarcely to be distinguished from deposit, a higher degree of care was exacted. The contrast is with *commodatum*, where the benefit of the contract was entirely for the borrower, although the lender also might have an advantage, if he gave the use of the thing in order to induce some one to take better care of it. (Mos. et. Rom. Legum Collat., 10, 2, 1 ; 10, 2, 2 ; D. 13, 6, 5, 2.)

Illustrations.

A slave deposits a plate with Gaius. Gaius, thinking Titius to be the master of the slave, gives it up to him. The true owner has no remedy against Gaius, who acted honestly, although in mistake. (D. 16, 3, 1, 32.)

Titius deposits some plate with Gaius, and dies, leaving several heirs. Certain of the heirs demand the plate. Gaius was advised that the best course was to go before the Praetor and obtain an order for the delivery of the plate. But even if Gaius did not take that precaution, and gave up the plate to the demandants without any intention of prejudicing the other heirs, he was not liable to them. (D. 46, 3, 81, 1.)

A testament is deposited for safe custody with Titius, who reads the contents aloud to his neighbours. This is gross negligence (*culpa lata*) ; or, if done maliciously, *dolus* ; and in the latter case the *depositarius* was exposed to the *actio injuriarum* as well. (D. 16, 3, 1, 38.)

Sempronius deposits plate with Gaius, and Gaius deposits it with Titius. Titius by his *dolus* causes the loss of the plate. Gaius is not responsible for the loss, but is bound to give Sempronius his right of action against Titius. (D. 16, 3, 16.)

¹ Praetor ait : “ Quod neque tumultus neque incendii neque ruinae neque naufragii causa depositum sit, in simplum, [ex] earum autem rerum, quae supra comprehensae sunt, in ipsum in duplum, in heredem ejus, quod dolo malo ejus factum esse dicitur qui mortuus sit, in simplum, quod ipsius, in duplum judicium dabo.” (D. 16, 3, 1, 1.)

A slave belonging to Titius gives Gaius money to pay to Titius for his manumission. Gaius pays the money. Is he liable to Titius to restore the money deposited, because a deposit by the slave is, in law, a deposit by the master? If Gaius informed Titius with what purpose the money was deposited with him, Titius has of course no ground of complaint. But if Gaius paid the money as if it were his own, he is liable to make good the deposit; for, in point of fact, he has not returned it; it is one thing to return a deposit, and another to give a thing as from oneself. (D. 16, 3, 1, 33.)

2. The *depositarius* must not use the thing. Such a use may amount to a theft of the use, or may merely subject the *depositarius* to payment of interest. (C. 4, 34, 3; C. 4, 34, 4.)

3. If without his fault the *depositarius* loses the thing deposited, he must give the depositor all his rights of action against the person by whom the loss was caused. (D. 16, 3, 16; D. 16, 3, 1, 47; D. 16, 3, 2; D. 16, 3, 3; D. 16, 3, 4.)

4. To return the thing on demand, with all its produce and accessions, and without making any charge. (D. 16, 3, 1, 45; D. 16, 3, 1, 24; D. 16, 3, 34.)

Further, he with whom anything is deposited incurs an *obligatio re*, and is liable to an *actio depositi*. For by it he is bound to restore the thing he received. (J. 3, 14, 3.)

If the *depositarius* is in a position to return the thing on demand, and refuses, he must pay interest. (Paul, Sent. 2, 12, 7; C. 4, 34, 2.)

B. By Special Agreement.

I. It was not unusual to make an agreement that the *depositarius* should take as much care of the thing deposited as a good *paterfamilias*. (D. 16, 3, 1, 35; D. 16, 3, 1, 6.) In some cases the *depositarius* might be responsible even for accidental loss.

Illustration.

Titius wishes to buy an estate with borrowed money, but does not wish to raise the money until the sale is accomplished. Gaius, who wants to lend, and is obliged to go abroad, leaves him the money on condition that if the purchase is made the money shall be a loan. In this case, accidental loss of the money falls on Titius. (D. 12, 1, 4, pr.)

II. Duties of *depositor* = rights *in personam* of *depositarius*.

1. The *depositor* must pay all the expenses incident to the custody of the thing, as the food of slaves (D. 16, 3, 23; Mos. et Rom. Legum Collat., 10, 2, 5), or the expense of carrying anything to the place where it is to be delivered. (D. 16, 3, 12, pr.; D. 16, 3, 12, 1.)

2. He must make good all damage caused by the thing

deposited, if he knew that it was likely to cause damage; as, for example, a slave given to stealing. (D. 13, 7, 31.)

INVESTITIVE FACTS. — As in the other contracts *re*, the investitive fact is the *delivery* of a thing, not mere consent. Hence a written instrument attesting a deposit has no value if the thing has not actually been delivered. (D. 16, 3, 26, 2.)

REMEDIES.

1. To enforce the duties of the *depositarius*.

1. *Actio depositi directa*.

1°. Damages. By the law of the XII Tables, a penalty of twofold the value of the thing was given against a depositary who did not return the thing deposited; but by the Praetor, the double penalty was retained only when the deposit was compulsory. (Paul, Sent. 2, 12, 11; D. 16, 3, 18.)

2°. Condemnation brought infamy (*infamia*) on the *depositarius*. (C. 4, 34, 10; Mos. et Rom. Legum Collat., 10, 2, 4.) (See as to *Infamia*, *postea*.)

3°. It is an action *bonae fidei*. (D. 16, 3, 1, 23.) But no set-off was allowed; the *depositarius* must restore the thing without deduction of what the *depositor* may owe him. (Paul, Sent. 2, 12, 12; C. 4, 34, 11.)

4°. The oath of the plaintiff as to the value of the thing deposited is taken. (D. 16, 3, 1, 26.)

5°. Although this action is of Praetorian origin, the contract of deposit is of older date, and was enforced by an action of the civil law; and hence this action is not limited to one year, but is perpetual, subject to the general rules of prescription.

2. *Actio utilis depositi directa*.

This is the action brought by a person to whom the depositor has given his right of restitution (C. 3, 42, 8); or by the depositor against a person with whom the *depositarius* has deposited the thing. (Paul, Sent. 2, 12, 8.)

II. To enforce the duties of *depositor*.

1. *Actio depositi contraria*, regarding which nothing special is to be noted.

PIGNUS.—In the Institutes, pledge (*pignus*) is included among the contracts *re*. But in this work it has been placed among the other forms of mortgage.

IV.—MANDATUM.

DEFINITION.

Mandate is a contract in which one person (*is qui mandatum suscipit, mandatarius*) promises to do or to give something, without remuneration, at the request of another (*mandator* or *mandans*), who, on his part, undertakes to save him harmless from all loss.

Lastly, we must know that a mandate (*mandatum*), unless gratuitous, ceases to be a mandate, and passes into business of another kind. For if payment is settled on, it is at once a case of letting and hiring. And (to

speak generally) in all cases where the business contract is one of mandate or deposit, if the duty is undertaken without payment, the fact that payment comes in transforms the contract into one of letting and hiring. If, therefore, you give clothes to a fuller to clean and do up, or to a tailor to mend, without settling on or promising a payment, the *actio mandati* is open to you. (J. 3, 26, 13; G. 3, 162.)

Mandate is the only gratuitous consensual contract. In no other consensual contract was a promise without consideration binding: but the peculiarity of mandate is, it exists only when there is no consideration.

The gratuitous nature of the contract began to be felt as an inconvenience; and although, strictly, payment could not be recognised, yet a sum might be agreed upon to be paid as a *honorarium* (D. 17, 1, 6); and even a salary might in later times be paid. But it could be recovered only by special action, and was not recognised as an element in the mandate. (C. 4, 35, 17; D. 17, 1, 56, 3.)

A mandate may exist either for our own sake or for some third person's. For I may give you a mandate to manage business either for me or for some third person, and in both cases there will be an *obligatio mandati*, and we shall be liable to one another in turn,—I for your expenses, you to act in all good faith toward me. (G. 3, 155.)

The contract of mandate is formed in five ways. For the mandate is given you either for the giver's sake only, or for his and yours, or for that of some third person only, or for the sake of the giver and some third person, or for your sake and that of some third person. But if it is for your sake only that the mandate is given you, it is superfluous. [For what you were going to do for your own sake, and acting on your own opinion, you will not be regarded as doing as the result of a mandate from me.] No obligation, therefore, arises out of it, nor any *actio mandati* between you. (J. 3, 26, pr.; G. 3, 156.)

It is for your sake only that a mandate comes in; if, for instance, a man gives you a mandate to invest your money in the purchase of land rather than to put it out at interest, or *vice versa*. Now a mandate of this sort is rather a piece of advice than a mandate, and therefore is not obligatory; for no one incurs an *obligatio mandati* by giving advice, even though it turns out ill for him to whom it is given. For each man is free to search out for himself whether the advice is good. If, therefore, you have money lying idle by you at home, and some one urges you to buy something with it or to lend it out, even though such buying or lending turns out ill for you, he is not liable to you in an *actio mandati*. And so much so that it has been questioned whether he that has given you a mandate to lend money at interest to Titius is liable to an *actio mandati*. But Sabinus' opinion has prevailed that the mandate in this case is obligatory, for [the mandate was not a general one to lend money on interest, but a special order to lend it to Titius, and] you would not have lent it to Titius but for this mandate. (J. 3, 26, 6; G. 3, 156, as restored.)

The obligation of a *mandator*—i.e., of the person making the request—was to save the other harmless. In giving general advice, a person could never be supposed to undertake that obligation. But the ground of the distinction set forth in the outset may be looked at in another aspect. The contrast drawn by Gaius between general advice to lend money and a request to lend money to a particular person, correctly

illustrates the principle of the distinction. It would be absurd to infer an intention to indemnify from loss when no specific act was recommended, but a mere general preference of lending money to buying land was expressed ; but it may be reasonable to presume such an intention when a particular act is recommended in respect of a particular person. If, therefore, Sempronius had advised Titius to buy the slave Stichus, instead of lending money to Seius, and Titius had bought Stichus, and been evicted without being able to recover the price from the seller, he would doubtless have had an action against Sempronius. The question really turns on the intention of the parties ; did the *mandator* request the *mandatarius* to act in such a manner as to lead the latter to expect indemnification, and therefore to make an investment, or do something exposing himself to loss that he would otherwise have escaped ?

Illustration.

Aurelius Quietus gave a mandate to his medical guest in these terms:—"At your gardens near Ravenna pray set up a tennis court, warm baths, and whatever else is necessary for your health, at my expense." The doctor spent 100 *aurei* on improvements of this nature ; but on selling his gardens found that the price was enhanced only to the extent of 40 *aurei* in consequence of his improvements. He can recover the balance of 60 *aurei* in an action of mandate. (D. 17, 1, 16.)

1. A mandate comes in for the sake of him that gives it,—as when a man gives you a mandate to manage his business, or to buy a farm for him, or to undertake (*spondere*) on his behalf. (J. 3, 26, 1.)

Illustrations.

Titius requests Seius to buy a certain article for him out of his own money. After the thing is bought and paid for by Seius, Titius refuses to take it : Seius can sue him, not only for the price paid, but for interest. (Paul, Sent. 2, 15, 2.)

An example of a general power of administration is given in D. 17, 1, 60, 4. Lucius Titius committed the administration of his property to his nephew in these terms:—"To Seius, my son, greeting. I indeed hold it to be according to nature that a brother or brother's children should act for a brother without any express authority ; but still if there should be any necessity for your interference, I grant you power to act for me in all my concerns, if you will ; to buy, sell, contract, and in all other ways to act as owner of all my property. I authorise all you do, and refuse my sanction to nothing."

2. It may be for the sake of both you and the giver,—as when a man gives you a mandate to lend money at interest to a third person that borrows it for the good of the giver's property ; or when you wish to bring an action against him as surety, gives you a mandate to bring the action against the principal at his risk ; or gives you a mandate to stipulate at his risk, with a substitute of his choosing, for a debt he had owed to you. (J. 3, 26, 2.)

Seius is about to sue Titius as surety, and Titius requests him to sue the principal debtor at his risk. After the changes made by Justinian, this case could not occur, as the creditor was in every instance obliged to sue the principal debtor before the surety.

Titius owes money to Seius, and Sempronius to Titius. On being sued by Seius, Titius requests Seius to accept from Sempronius a promise by stipulation to pay the amount, on condition that if Sempronius does not pay the money he will.

A dispute regarding an inheritance took place, and claims were advanced on the

part—(1) of the heirs named in the will ; (2) of a paternal uncle, Maevius ; and (3) of several paternal aunts, sisters of Maevius. Maevius wrote to his sisters, saying he would share with them whatever he recovered in a suit he was about to institute against the testamentary heir. No stipulation followed. Maevius compromised the case, and got some lands and other property. Could the sisters compel him to share with them? Yes, because a request was implied on their part to Maevius to take legal proceedings to recover the property to which they all laid claim. (D. 17, 1, 62, pr.)

3. A mandate may come in for the sake of a third person only,—as when he gives you a mandate to manage Titius' business, to buy a farm for Titius, or to become surety for Titius. (J. 3, 26, 3.)

In this case the *mandator* was simply a surety. In what respects suretyship so constituted differed from the verbal contract of suretyship (*fidejussio*) will hereafter be examined. (See Accessory contracts.)

4. It may be for the sake of the giver and a third person,—as when he gives you a mandate to act in business common to himself and Titius, or to buy a farm for Titius and himself, or to undertake for Titius and him. (J. 3, 26, 4.)

"Titius to Seius. Greeting.—You are aware of the interest I take in Sempronia, and since you are about to marry her in accordance with my wishes, I desire to see you married in a manner suitable to your position. Although I know that Titia, the mother of the girl, will promise you a suitable dowry, still I, the more to win your attachment to my house, do not hesitate also to pledge my word. Wherefore, know that for whatsoever sum you stipulate with her, I will be surety, and will see you paid."

This is an example of a letter of mandate. (D. 17, 1, 60, 1.)

5. It may be for your sake and that of a third person,—as when a mandate is given you to lend Titius money at interest. But if the mandate is to lend him money without interest, then it is for the sake of the third person that the mandate comes in. (J. 3, 26, 5.)

RIGHTS AND DUTIES.

A. Duties of *Mandatarius* = Rights *in personam* of *mandator*.

I. To do what he has promised. (D. 17, 1, 22, 11.)

A mandate any one may freely refuse to undertake. But if it is once undertaken, it must be fulfilled or renounced as soon as possible, so that he that gave it may carry out the same matter, either in person or through some one else. For unless the renunciation is so made that the whole case is kept untouched for the giver of the mandate to resolve the matter himself, then none the less there is room for an *actio mandati*,—unless, indeed, some good reason comes in for not renouncing, or for renouncing at an unreasonable time. (J. 3, 26, 11.)

Paul gives instances of "good reasons,"—sudden illness, a necessary journey, enmity arising between *mandator* and *mandatarius*, or a *mandator's* loss of credit, and inability to meet his obligations. (Paul, Sent. 2, 15, 1.)

The obligation on the *mandatarius* is, therefore, not unquali-

fied. A person that has gratuitously undertaken a mandate is not bound to execute it unless he has the means of doing so, and has put the *mandator* in a position where he cannot have the commission executed by any one else. The obligation of the *mandatarius* can therefore be got rid of at any time, if he gives the *mandator* an opportunity of getting another to perform the mandate. It would be unfair, if after having undertaken to do a service, and having made it impossible for any one else to do it, the *mandatarius* were at the last moment to refuse. This would be taking advantage of the confidence reposed in him, to do an injury to the *mandator*.

If a consideration has been promised for a service to be rendered, then the person that undertakes it cannot renounce. Suppose Titius asks Seius to manage his estate during his absence on a campaign. If Titius agrees to pay Seius a salary for his trouble, then Seius cannot refuse the superintendence without exposing himself to an action for damages. But if no wages are to be paid, Seius can refuse up to the time that Titius goes away, provided he gives him an opportunity to find another. It would be grossly inequitable if Seius were allowed, just at the moment when Titius was obliged to go, to throw up the management; accordingly, in the Roman Law, Seius was obliged to execute his promise, or else pay the damage resulting from his refusal. (C. 4, 35, 16; D. 17, 1, 27, 2.) Hence, if no loss is actually suffered, either because there was no necessity for doing what was promised, or another did it, Titius has nothing to answer for. (D. 17, 1, 8, 6.)

II. To execute the commission as it was given, leaving nothing undone, and doing nothing wrong. (D. 17, 1, 5, pr.) If the *mandatarius* does not execute his commission according to its terms, he is not entitled to his counter claim against the *mandator*. (D. 17, 1, 41.)

In the discharge of a mandate one ought not to overstep its bounds. [For if he does, the principal has an *actio mandati* against him for the amount of the principal's interest in its fulfilment—supposing always he could have fulfilled it; while against the principal he has no action in turn.] If, for instance, a man gives you a mandate to spend any sum not exceeding 100 *aurei* in buying a farm, or in undertaking something for Titius, you ought not to buy the farm at a higher price, nor to become surety for a larger sum. If you do, you will have no *actio mandati* against him. Sabinus and Cassius indeed held that, even if you are willing to bring the action for a sum not exceeding 100 *aurei*, it will still be in vain. But the authorities of the opposing school rightly think that you can bring an action for a sum

not exceeding 100 *aurei*; and this opinion is certainly milder. But if you bring for a less sum, you will have an action against him. For he that gives you a mandate to buy him a farm for 100 *aurei* is understood to give you a mandate to buy it for less if you can. (J. 3, 26, 8; G. 3, 161.)

Illustrations.

Titius gives Seius a commission to sell a slave for 10 *aurei*. Seius sells the slave for 9. The sale is good; but Seius must make up the price to Titius. (Paul, Sent. 2, 15, 3.) This view is not borne out by the following cases:—

Titius asks Seius to sell his (Titius') farm for 100 *aurei*, and Seius sells it for 90. If Titius sues for his land, he will recover it unless the price is made up to 100. (D. 17, 1, 5, 3.)

Calpurnius requests Attius to buy the house of Seius for 100 *aurei*. Attius instead bought the house of Titius for less. Calpurnius is not bound to accept it. (D. 17, 1, 5, 2.)

Titius requests Seius to pay a sum that he owes to Cornelius. Instead of paying it to Cornelius, Seius induces Cornelius to accept him as a substitute in the place of Titius, and afterwards has to pay the money. Although Seius has not observed the exact terms of the mandate, still this is a substantial performance. (D. 17, 1, 45, 4.)

"Lucius Titius to his Gaius. Greeting.—I request and order (*mando*) you to become a surety for Publius Maevius to Sempronius; and whatever sum Publius shall fail to pay you, I hereby inform you by this letter, written with my own hand, that I will instantly pay you." Gaius did not become surety (*fidjussor*), but he gave a mandate to Sempronius to advance money to Maevius. Inasmuch as, in either way, Gaius made himself responsible if Maevius made default, he had a remedy against Titius upon this letter. (D. 17, 1, 62, 1.)

Titius requests Seius to buy a farm, without stating that he will not accept a part, but only the whole of it. Seius buys a half. This is a good performance. (D. 17, 1, 36, 3.)

III. The *mandatarius* must execute the mandate honestly, and with as much care as a good *paterfamilias*. (C. 4, 35, 13.)

A *mandatarius* is guilty of *dolus* when he refuses to give up to the *mandator* what he has got through the mandate, and has in his power (D. 17, 1, 8, 9); or when he refuses to sue when it is in his power to sue. (D. 17, 1, 44.) But the *mandatarius* is not liable for accidental loss unless he specially undertakes that responsibility. (D. 17, 1, 39.)

This obligation may be contrasted with the parallel gratuitous contract of deposit. In that contract the *depositarius* answers only for fraud (*dolus*), not for carelessness.

The responsibility of the *mandatarius* is said to arise from the contract being originally made between friends, with no voucher but their honour, and implying a high degree of care. Whether this is a satisfactory reason is somewhat doubtful, when we consider that a less amount of care was required in the non-gratuitous contract of partnership.

Modestinus (Mos. et Rom. Leg. Collat. 10, 2, 3) states that the *mandatarius* answers for *dolus* only, not for *culpa*, and in this respect contrasts him with a *tutor*. The services of *mandatarius* and *tutor* are in each case gratuitous, yet in the former, says Modestinus, only *dolus* is reckoned; in the other both *dolus* and *culpa*. But the statement of Modestinus was undoubtedly not law; it is interesting, however, as

evidence that there was not complete unanimity among the Roman jurists on the subject of the responsibility of the *mandatarius*.

Illustrations.

Calpurnius requests Felix to inquire into the value of an inheritance left him. Felix does so, and reports it worth 500 *aurei*. Upon this representation Calpurnius sells the inheritance to Felix for that sum. Really it was worth 900 *aurei*. Calpurnius cannot set aside the sale on the ground of inadequacy of price, but he can sue Felix for 400 *aurei*, because he misled him to that extent in executing his mandate. (D. 17, 1, 42.)

Titius requests Seius to inquire into the resources of Piso, who has asked him for an advance of money. Seius, willing to do a good turn to Piso, represents him as perfectly trustworthy. Titius advances money to Piso, who is really insolvent. Seius must make good the loss. (D. 17, 1, 42.)

Julius being plaintiff in a suit, appoints Licinius his procurator, who, by collusion with the defendant, allows the claim to be defeated. Licinius must make good the loss; and if he is insolvent, an action for fraud (*actio de dolo*) lies against the defendant. (D. 17, 1, 8, 1.)

Titius requests Seius to buy Pamphilus for him at an auction. Seius did not bid for the slave, from a desire to please a rival bidder. Seius is answerable to Titius for the loss. Suppose, however, Seius bought Pamphilus, and the slave escaped. Is Seius liable? Only if the escape was due to his connivance (*dolus*) or want of care. (D. 17, 1, 8, 10.)

Sempronius requests Gaius to buy a slave, and Gaius in doing so neglects to make the seller warrant the absence of defect or disease. If Sempronius suffers any loss by this neglect, Gaius must make it good. (D. 17, 1, 10, 1.)

IV. The *mandatarius* must give up to the *mandator* all the produce of the things committed to his care (D. 17, 1, 10, 2),—the money or other property acquired by him as *mandatarius* (D. 17, 1, 10, 9), and all rights of action against third parties. (D. 17, 1, 4, 3.) If the *mandatarius* is unable to do so in consequence of his own misconduct or fault, he must make good the loss.

Illustration.

Titius lends money to Calpurnius, and afterwards at his request Seius stipulates for the amount from Calpurnius. The effect of this is that the loan ceases to exist, and is transformed into a debt due by stipulation. Titius dies, and his heirs demand from Seius his right of action against Calpurnius, because they have no remedy upon the loan. If Titius did not intend to make a gift of the debt to Seius, Seius must allow the heirs of Titius to sue Calpurnius in his name. (D. 17, 1, 59, pr.)

B. Duties of *Mandator* or *Mandans* = Rights in *personam* of *mandatarius*.

I. To pay the *mandatarius* what he has properly expended in executing the mandate. (D. 17, 1, 12, 9.) This includes not only the money spent in obtaining produce (*fructus*), but personal expenses (unless included in salary), as for travelling. (D. 17, 1, 10, 9.) But luxurious expenditure is not allowed.

Anything, however, of the nature of ornament added by the *mandatarius* may be taken away by him, if it does not injure the *mandator*, unless the latter is willing to pay for it. (D. 17, 1, 10, 10.)

Illustration.

Titius requests Seius to buy Stichus for him. After the purchase, Stichus steals from Seius. Can Seius sue Titius for damages or the surrender of the slave to him? Yes, if the theft was not due to his fault. If Titius knew the character of Stichus, and did not forewarn Seius, he is liable to pay to Seius the total loss sustained, even if that exceeds the value of the slave. (D. 17, 1, 26, 7; D. 47, 2, 61, 5.)

II. To accept whatever the *mandatarius* has bought, and indemnify him against all obligations that he has undertaken in execution of the mandate. (D. 17, 1, 45, pr.; D. 17, 1, 45, 5.) In a word, the obligation of the *mandator* was to see that the *mandatarius* suffered no loss from executing the mandate. As the *mandatarius* got nothing, so he ought to lose nothing. But this obligation was conditional; it depended upon whether he properly performed the mandate. (D. 17, 1, 41.) If he faithfully executed his commission, and spent money or subjected himself to obligations, it would have been a gross breach of faith if the *mandator* had refused to release him from the obligations, or to reimburse him what he had spent. The *mandatarius* acted for the *mandator*, not for himself. It follows that until the mandate was executed no action lay against the *mandator*. (D. 17, 1, 45, 1.) The obligation of the *mandator* has thus an affinity with the duties arising from contracts *re*. Since I have acted for you, and incurred certain expenditure, you are bound to indemnify me. This performance of the mandate is analogous to the delivery of a *res* in *mutuum* or *depositum*. The principle in both cases is the same.

On the other hand, the obligation of the *mandatarius* to execute the contract is not absolute; it is limited to the case where the *mandator* has, in consequence of the promise of the *mandatarius*, not done something he would otherwise have done, and has thereby sustained loss. (D. 17, 1, 6, 5.) In this respect the position of the *mandator* is unique. He acquires a right against the *mandatarius*, not from any act (as in the other cases of equitable contracts, and the corresponding right of the *mandatarius* against the *mandator*), but from a forbearance to do what his interests required him to do, and what he would have done but for the confidence he reposed in the promise of the *mandatarius*. Hence mandate may, without impropriety, be assigned a place in the class of Equitable Contracts.

INVESTITIVE FACTS.—A mandate does not require to be made in any set form of words, and it may be implied from the conduct of the parties. (D. 50, 17, 60 ; D. 17, 1, 62, pr.)

SPECIAL DIVESTITIVE FACTS.

1. But a mandate, although properly entered into, may be revoked so long as it has not been acted on in any way ; and thereupon is at an end. (J. 3, 26, 9 ; G. 3, 159.)

It would be inequitable to allow a *mandator* to revoke a mandate after it had been partially fulfilled, so as to escape his obligations to the *mandatarius*. (D. 17, 1, 16.)

2. Renunciation of the *mandatarius*. The limits within which this could be done have been already mentioned (p. 312).

3. Again, if while a mandate has not as yet been acted on in any way, one of the parties—either the principal or the agent—dies, the contract of mandate is dissolved. But for convenience sake it is a received opinion that if your principal dies, and you in ignorance of his death carry out the mandate, then you can bring an *actio mandati*. For were it not so, a lawful and reasonable ignorance would bring loss upon you. And similarly it is held that if Titius' steward is manumitted, and his debtors through ignorance pay the freedman, then they are clear ; although otherwise, in the strict account of law, they could not be clear, because they paid another, and not the person they ought to have paid. (J. 3, 26, 10 ; G. 3, 160.)

REMEDIES.

- I. *Actio mandati (directa)*. By the *mandator* against the *mandatarius*.
Condemnation involves infamy, if the breach of duty has been wilful. (D. 3, 2, 1.)
- II. 1. *Actio mandati (contraria)*. By the *mandatarius* against the *mandator*.
2. *Persecutio extra ordinem* for salary (*honorarium*) promised. (C. 4, 35, 1.)

Third, CONTRACTS FOR VALUABLE CONSIDERATION.

The fourth group of contracts enumerated by Justinian is distinguished from the others by the absence of any special form : they are said to be created by consent alone.

The contracts made by consent are those of purchase and sale, letting and hiring, partnership, and mandate. (J. 3, 22, pr. ; G. 3, 135.)

In those forms the obligation is said to be contracted by consent, because neither writing nor the presence of the parties is at all needful ; nor need anything be given to make the obligation actually binding, but the consent of those that are doing the business is enough. (J. 3, 22, 1 ; G. 3, 136.)

And hence such business contracts are even made between persons not present, by a letter for instance, or by messenger. [But in no other way can an *obligatio verbis* be formed if the parties are not present.] (J. 3, 22, 2 ; G. 3, 136.)

Again, in those contracts each incurs an obligation to the other to render what is fair and just ; whereas in contracts made by words one party stipulates and the other promises. (J. 3, 22, 3 ; G. 3, 137.)

In the case of entries, one binds the other by entering the money as paid out, and that other is bound in turn. Against a man not present an entry of debt may however be made, although no verbal contract can be made with one not actually present. (G. 3, 138.)

The circumstances dwelt upon in the text are that the consensual contracts are bilateral (not unilateral, like stipulation), that they are *bonae fidei* (not *stricti juris*), and that they may be completed in the absence of the parties. But mandate is not any more bilateral than deposit ; the equitable contracts are *bonae fidei*, and as Gaius points out, the *expensilatio* does not require the presence of the parties. The mark that distinguishes this class of contracts from all others—namely, the presence of valuable consideration, the Institutes were not at liberty to mention, if for no other reason, on account of the position assigned to the gratuitous contract of mandate.

I.—SALE (*EMPTIO-VENDITIO*).

DEFINITION.

Sale is a contract in which one person (*venditor*, seller) promises to deliver a thing to another (*emptor*, buyer), who on his part promises to pay a price (*pretium*).

To constitute a sale, three things were required—(1) a thing ; (2) a price ; and (3) an agreement between two persons to give one for the other. In regard to two of these elements—the consent and the thing—there is nothing peculiar or distinctive, and the observations to be made upon them will find a place in the Second Subdivision. The other element—price—requires some explanation.

1. The price must be coined money.

And further, the price ought to be fixed. For there can be no sale without a price. (J. 3, 23, 1 ; G. 3, 140.)

Again, the price ought to be in money. For whether anything else—a slave for instance, a robe, or a farm—can be the price of another thing, is much disputed. Sabinus and Cassius think it can ; and hence the common saying that barter is sale, and its oldest form. For proof they used the Greek poet Homer, who in one place says that the army of the Greeks got wine for itself by bartering certain things. His words are :—“And thence too wine was got by the long-haired Achacans, some bartering for it bronze, and others the glistening steel, some hides, and some the cows themselves, and some again slaves.” But the authorities of the opposite school thought differently, and held that barter was one thing, sale another. For how else, said they, could it be made clear in a sale which was the thing sold and which the price ? And it would be absurd to regard each as at once the thing sold and the price paid. [Caelius Sabinus says that if you have a thing for sale, say a farm, and I come and give a slave as its price, then the farm

is the thing sold, and the slave is given as the price for receiving the farm.] But the opinion of Proculus, who says that barter is a kind of contract distinct from sale, has deservedly prevailed. For he both backs up his view by other lines from Homer, and argues for it by very strong reasons. Former Emperors too have allowed it; and it is more fully shown in our Digest. (J. 3, 23, 2; G. 3, 141.)

It is enough, however, if part of the consideration is a price.

Illustration.

Titius sells a house to Gaius for 2 aurei, and on consideration that Gaius repairs another house. It was held that an action of sale (*ex vendito*) would lie against Gaius for the repairs. (D. 19, 1, 6, 1.)

Although the contract must be for a *price*, the payment may be in goods. There is nothing to hinder the seller, after the contract is made, agreeing to take goods for the price. (C. 4, 44, 9.)

2. The price must be definite.

The price ought also to be definite. But if instead of this the parties agree that the thing is to be bought at the value to be put upon it by Titius, then among the ancients there were debates enough and to spare whether this constituted a sale or not. [Labeo said the transaction had no force; and Cassius approved of this view. But Ofilius declared it was a sale; and his opinion was followed by Proculus.] But our decision has settled the question in this way:—Whenever a sale is agreed for at a price to be fixed by a third person, the contract is to stand, but under this condition. If the person named fixes a definite price, then in any case his valuation must be followed, the price fully paid, the thing delivered, and so the sale fully accomplished. For the buyer can proceed by the *actio ex empto*; the seller by the *actio ex vendito*. But if the person named is either unwilling or unable to fix a definite price, then the sale goes for nothing, as if no price had been determined on. And since this is held by us to be the law in the case of sales, it is only consistent to extend it to the case of letting and hiring. (J. 3, 23, 1; G. 3, 140.)

The constitution referred to is (C. 4, 38, 15.)

Thus, there was no contract if the determination of the price was left to the purchaser, thus, “for as much as you think fit or please.” (D. 18, 1, 35.)

3. The price must be real and not merely colourable (*imaginaria venditio*). (D. 50, 17, 16.) The price may be made less as a favour to the buyer (D. 18, 1, 38), but if it is not intended to be demanded, there is no sale. (C. 4, 38, 3.)

4. In the absence of fraud, the Praetor refused to cancel a sale on the ground of mere inadequacy of price. (D. 4, 4, 16, 4.) But it is stated in a rescript of Diocletian and Maximian, that when a thing was sold for less than half its value, the seller could recover the property, unless the buyer chose to make up the price to the full amount. (C. 4, 44, 2.) Although the

language of the rescript is perfectly general (*rem majoris pretii si tu vel pater tuus minoris distraxerit*), some authors contend that this rescript applies only to land, because the example mentioned is a farm. It is a moot point whether, if the price were excessive, the buyer could withdraw from his bargain, unless the seller consented to take a fair price.

RIGHTS AND DUTIES.

DUTIES OF SELLER (*Venditor*) = RIGHTS *in personam* OF BUYER (*Emptor*).

A. *In the Absence of Special Agreement.*

The distinction here followed is recognised by the Roman jurists. Ulpian (D. 19, 1, 11, 1) observes that in a contract *bonae fidei*, the first principle is to carry out the intentions of the contracting parties. If the parties are silent, then the duties are such as naturally pertain to the contract. This statement is rendered more explicit by another text from Ulpian, which puts the distinction on its proper basis, that the parties when silent are presumed to abide by the recognised custom. (*Ea enim quae sunt moris et consuetudinis, in bonae fidei judiciis debent venire.*) (D. 21, 1, 31, 20.) This points to the true origin of the group of duties now to be described. When the parties are silent, custom speaks.

I. The seller is bound to deliver the thing sold (*praestare, tradere rem*) to the buyer. (D. 19, 1, 11, 2; D. 18, 1, 25, 1.) If the thing were *res Mancipi*, the seller was bound to mancipate it to the buyer. (Paul, Sent. 1, 13, 4.) It must be observed that the obligation was simply to deliver, *i.e.*, to transfer the possession of the thing; not to make the buyer owner (*dominus*) of it. (D. 19, 4, 1, pr.) Hence, it was not necessary that the seller should be the true owner in order that the contract of sale should be valid. It is enough if the seller can give the buyer undisturbed possession. (D. 18, 1, 28.)

This duty was conditional upon the payment of the price. The seller was not obliged to part with the thing sold until he had got his money, and the whole of his money, (D. 19, 1, 50; D. 19, 1, 13, 8; D. 18, 4, 22.)

Illustration.

Titius sells wheat to Gaius for 10 *aurei*, and Gaius, before the wheat is delivered to him, dies, leaving two heirs. One of the heirs cannot, by offering 5 *aurei*, get the half of the wheat. Titius is not bound to part with any of it until he gets the whole price. (D. 18, 1, 78, 2.)

The obligation imposed on the seller to transfer merely the possession and not the ownership of the thing sold, is one of the most noteworthy features of the law of sale. What is the reason of this peculiarity? The object of a buyer is undoubtedly to make himself owner of that for which he pays a price; and the straightforward course would appear to be that the seller should be bound to make a good title. That was the rule in barter (D. 19, 4, 1, 3), but not in sale. In the case of sale, the obligation to make a good title is split up into two parts, which together are nearly equal to the whole. (D. 19, 1, 11, 2.) The seller was bound merely to deliver the thing sold, but if the buyer were evicted in consequence of the badness of the seller's title, the seller was bound to restore the price, and sometimes to pay a penalty. The meaning of this circuitous and clumsy arrangement can scarcely be doubted. If the seller had been bound to make a good title, then aliens (*peregrini*) could neither have bought nor sold, for they could not be owners (*domini ex jure Quiritium*). But aliens could "possess," and therefore an obligation to deliver possession combined with warranty against eviction, gave them as complete rights as it was possible they could have in the Roman Law.

The process can be traced with considerable certainty by which the law of sale was thus shaped in the interests of aliens. In the first place, aliens were allowed to make contracts by *stipulatio*, when the words *fidepromitto*, &c., were admitted. An alien could not make a *sponsio*, but he could make a stipulation by other words. It will be seen presently that warranty against eviction originally had no other basis than stipulation: if there was no stipulation, that is, no express warranty, the law implied none. We also find that the obligation of simple delivery was often created by stipulation (*vacuamque possessionem tradi*). (D. 19, 1, 3, 1; D. 45, 1, 52, 1; D. 22, 1, 4.) It is, therefore, scarcely a conjecture to affirm that sales were made by stipulations, and that those stipulations that were most convenient were most generally used; and we shall see presently by what authority actual stipulations were made superfluous, and the law implied the obligations that constituted the law of sale. It is quite within the mark to say that the law of sale, in its latest form, consisted of stipulations taken for granted.

Illustrations.

An heir sells to Gaius an estate of which Titius has been put in possession to secure a legacy. The heir cannot fulfil his obligation although he is owner. (D. 19, 1, 2, 1.)

Titius has a usufruct of Gaius' farm. Gaius sells the farm to Maevius. Gaius must redeem the farm before he can give Maevius free possession. (D. 19, 1, 7.)

Julius sells a farm over which a right of way exists to a neighbouring farm. This does not hinder the delivery of the free possession. (D. 18, 1, 59.)

Titius, heir of Sempronius, sold a farm to Septicius in these terms:—"The land of Sempronius, and all his rights thereon, you will buy for so much." The land was delivered; but its boundaries were not pointed out. Can Titius be compelled to produce the title-deeds of the inheritance, and show what rights Sempronius had, and what are the boundaries? Certainly; and if no such title-deeds exist, Titius must still point out the boundaries, as fixed by usage. (D. 19, 1, 48.)

A creditor to whom a farm was mortgaged, and who had possession of the receipts of taxes (*chirographa tributorum*), sold it to Maevius, with a condition that Maevius should pay any tribute that might be due. The same land, on account of alleged arrears of taxes, is sold by the contractor of the district, and Maevius buys it and pays the price. Maevius can compel the creditor to deliver up to him the receipts for the taxes that have been paid. (D. 19, 1, 52, pr.)

In the absence of any agreement to the contrary, a sale of a house included all that was commonly regarded as part of it, or was intended for the permanent better enjoyment of the house. (D. 19, 1, 13, 31; D. 19, 1, 17, 7.) For details, see D. 19, 1, 38, 2; D. 19, 1, 17, 8; D. 19, 1, 15; D. 19, 1, 18, 1; D. 18, 1, 78; D. 18, 1, 40, 6; D. 18, 1, 76; D. 50, 16, 245, 1.

The sale of a farm included the crop on the ground and fixtures in the soil, but not living animals, as fishes in a pond. (D. 19, 1, 17, 1; D. 6, 1, 14; D. 19, 1, 15; D. 19, 1, 16.) It did not include what was ordinarily called *ruta-cacca* (D. 18, 1, 66, 2), i.e., things dug up (*eruta*) as gravel, lime, &c.; or cut, as trees. (D. 19, 1, 17, 6.)

The sale of slaves did not carry with it the slave's *peculium*, unless specially agreed upon. (D. 18, 1, 29.)

II. Prior to the delivery of the thing sold to the buyer, the seller must take as much care of it as a good *paterfamilias*. (D. 18, 1, 35, 4.) He is responsible for *custodia* and *diligentia*. (D. 19, 1, 12, 30.)

This obligation might be diminished or enlarged. It was diminished if the buyer refused to accept the thing, or neglected to take it away after he was bound to do so. (D. 18, 6, 17; D. 18, 6, 12.) If no time were agreed upon, the seller ought, after a reasonable time, to give notice to the buyer* to remove the goods. (D. 18, 6, 4, 2.) If both buyer and seller made delay (*mora*), it was the same as if the buyer alone were in delay. (D. 19, 1, 51.) When the buyer made delay (*mora*), the seller was responsible only for wilful misconduct or extremely gross negligence (*dolus*), as in the case of a depositoe. (D. 18, 6, 17.) On the other hand, if the seller refused to give up the thing at the proper time, and was thus in delay (*mora*), he was

responsible not only for due care (*diligentia*), but for accidental loss.

Illustrations.

Titius sells a house to Gaius. The adjoining house is in a ruinous condition and threatens to fall. Titius does not require the owner of the dangerous property to give security (*cautio damni infecti*), and before the house sold is delivered to Gaius, it is injured by the fall of the next house. On account of his negligence in not requiring security, Titius must pay for the damage sustained. (D. 19, 1, 12, 30.)

Sempronius sells a house to Septicius, but before the time for delivery it is burned down by the carelessness of a slave belonging to Sempronius, and employed to watch the property. Does the loss fall upon Sempronius or Septicius? If Sempronius showed ordinary care in selecting the slave to watch the house, he was not responsible. (D. 18, 6, 11.)

Titius sells a slave to Gallus. After the sale, Titius orders the slave to do some dangerous work, and the slave breaks his leg. Is Titius responsible for the damage? Labeo said if Titius ordered the slave to do what he was accustomed to do before the sale, and what he would have ordered him to do if the sale had not taken place, he is not responsible. Paul took a different view, and said the question was whether the work was so dangerous that a prudent man would not have ordered it to be done either before or after the sale. (D. 19, 1, 54.)

III. The seller must compensate the buyer in the event of his being evicted by law from the whole or part of the thing bought. (D. 41, 3, 23, 1; C. 4, 52, 5; C. 8, 45, 6.)

This obligation was often created by express agreement. The technical phrase was *habere licere*, that the buyer should have undisturbed possession of what he bought. To the stipulation a penalty was added, in Rome, generally of twice the price of the thing sold, elsewhere, varying according to local custom. (D. 21, 2, 6.) The stipulation was kept up for the sake of the penalty, long after the obligation to pay for eviction was recognised as a duty of the seller. Hence the obligation to answer for eviction presents itself under three aspects. (1.) The buyer stipulates for a penalty in the event of his being evicted. (2.) If no penal stipulation was made, the buyer could at any time, prior to eviction, call upon the seller to make it. (3.) If neither the stipulation nor any demand for it was made, and the buyer was evicted, the seller was bound to give compensation. These three cases will be examined separately.

1. A stipulation is made, on this condition, that the seller promises to the buyer twice the price paid by him if he is evicted by law from the thing sold. If the promise were that the buyer should have undisturbed possession (*habere licere*), the seller was bound to pay the penalty if the buyer was evicted

by any one: if, however, the promise were that the seller and his heirs would not disturb the buyer, the penalty could not be exacted if an eviction were made by any other than those persons. (D. 19, 1, 11, 18.) If an eviction took place, the penalty became due (*stipulatio committitur*). In order that the penalty should become due, five things must concur.

1°. The seller must have promised absolutely. Thus, if he declined to guarantee for eviction in certain cases, the penalty was not due.

Illustration.

In selling a slave, the owner guaranteed against eviction, unless the eviction took the form of the freedom of the slave. If the slave were free at the time of sale, or were a *statuliber*, the buyer could not recover the penalty. (D. 21, 2, 69, pr.)

2°. The ground of the eviction (*causa evictionis*) must have existed at the date of the sale.

Illustration.

A slave was sold without his *peculium*. The slave took away part of his *peculium* to his new master, who was thereupon sued for theft. The penalty for the theft exceeded the value of the slave, and the buyer surrendered the slave to his old master (*noxae deditio*). The buyer was nevertheless bound to pay the price. If the theft had occurred before the sale, and the buyer had been obliged to surrender the slave, then the penalty for eviction would have been due. (D. 21, 2, 3.)

3°. The eviction must be by order of a court of law, and the order must not be bad in law. (D. 21, 2, 16, 1; D. 21, 2, 51, pr.)

If the eviction is by force, the remedy of the buyer is the interdicts to recover possession. (C. 4, 49, 17.)

If the buyer goes to arbitration and loses, he has no redress against the seller, because he was not forced to go to arbitration. (D. 21, 1, 56, 1.) If the judge that ordered the eviction made a mistake through ignorance or stupidity, the buyer had no redress. He was deprived of his property by the blunder of a judge, a calamity that ought to be assimilated to floods or the like, all of which losses must be sustained by the buyer. (Vat. Frag., 10; C. 8, 45, 8; C. 8, 45, 15.)

4°. The eviction must not be due to the fault of the buyer.

Illustration.

If the buyer, having a good defence as possessor, but no remedy if out of possession, allows the adversary to get possession, he must suffer the loss. (D. 21, 2, 29, 1; D. 21, 2, 66, pr.; C. 8, 45, 19.)

5°. The buyer must give notice to the seller of any threatened eviction, and allow the seller to come in and defend the title. (D. 21, 2, 53, 1; C. 8, 45, 20; C. 8, 45, 8; C. 8, 45, 17.) The neglect of this precaution involved a forfeiture of the penalty, unless the seller was out of the way and could not be found, or had expressly relieved the buyer from the necessity of giving him notice. (D. 21, 2, 63; D. 21, 2, 56, 6; D. 21, 2, 55, 1.)

If the buyer is evicted from only a part of the thing sold, or from the usufruct of it, the seller must pay twice the proportion of the price that ought to be given for what is lost, not twice the whole price. (D. 21, 2, 62, 1; D. 21, 2, 39, 5; D. 21, 2, 13; D. 21, 2, 14; D. 21, 2, 15, pr.)

2. If no stipulation were made at the time of the sale, the seller was bound to promise a penalty of double the price by stipulation, but not to give sureties for the amount. (D. 21, 1, 31, 20; D. 21, 2, 37, pr.; D. 21, 2, 56, pr.) This obligation seems to have rested on an edict of the Curule Ædile, the terms of which have not come down to us. It was confined, probably by the terms of the edict, to sales of articles of value—as pearls, precious stones, silk garments, slaves. (D. 21, 2, 37, 1.) It seems also that the defendant was compelled to pay double if he refused to promise. (D. 21, 2, 2.)

3. If no stipulation were made, and the buyer was evicted, the seller was bound to give him compensation. (C. 8, 45, 6; D. 19, 1, 3; Paul, Sent. 2, 17, 1.) This obligation was imposed in the absence of a penal stipulation, and the seller was bound simply for compensation, not for a penalty. (D. 21, 2, 60.)

The measure of damages was not the price the buyer gave for the thing, but the loss he suffered by the eviction. (*Quantum interest rem evictam non esse; non quantum pretii nomine dedisti.*) (C. 8, 45, 23.) Hence the amount payable was greater or less, according as the thing increased or lessened in value. (D. 21, 2, 70; C. 8, 45, 9.) In no case, however, where the seller was ignorant of the flaw in his title, could he be compelled to pay more than twice the price as compensation for eviction. (D. 19, 1, 44.)

The stipulation being for a penalty was construed strictly; the obligation considered as of the essence of a contract in good faith was interpreted more liberally, with less regard to the letter and more to the spirit of the contract.

1°. As regards the exception of grounds of eviction (*causae evictionis*).

Illustration.

A slave is sold by Titius, who says, in a general way, that the slave is entitled to liberty upon the happening of an event, but without disclosing the event. If the buyer did not know the condition, he can demand compensation; but in this case the penalty of stipulation could not be exacted. (D. 21, 2, 69, 5.)

2°. In the penal stipulation the eviction must be by law; but in this obligation *bonæ fidei*, that is not necessary; it is enough if the thing sold were not the property of the seller. (D. 21, 2, 41, 1.) Thus, if the buyer himself subsequently becomes the owner of the thing sold, he can recover damages as for eviction. (D. 19, 1, 13, 15.)

Illustrations.

A vase is left to Titius as a legacy upon a condition. Titius, knowing nothing of the legacy, buys the vase from the heir. He can recover the price in an action for breach of contract of sale. (D. 19, 1, 29; D. 30, 1, 84, 5.)

Gaius sells a slave belonging to Sempronius to Titius, and Sempronius dies, leaving Titius his heir. Titius can compel Gaius to restore the price of the slave. (D. 21, 2, 9.)

The other conditions (2°, 4°, and 5°) apply equally to the general obligation and the penal stipulation.

IV. The seller must suffer the sale to be rescinded, or give compensation in the option of the buyer, if the thing sold has undisclosed faults that interfere with the proper enjoyment of it. (D. 19, 1, 13, 1.) If the seller is ignorant of the faults, he is still responsible; but his ignorance affects the amount of damages. (D. 19, 1, 13, pr.) If the seller knows of the faults and conceals them, he is guilty of bad faith (*dolus*). In speaking of this duty (IV.), therefore, it is assumed throughout that the seller was ignorant of any faults in the thing sold.

We are left in no doubt as to the source whence this obligation was added to the law of sale. At first, no obligation existed except where there had been an express warranty against faults in the thing sold by the formal contract of stipulation. This explains a curious restriction in the duty. The seller was not responsible for all faults, but only for those that hinder the free possession of the thing. This limit is found in the early forms of stipulations, which are ascribed to M. Manilius, who was consul B.C. 148.

"That those she-goats are to-day in good health and able to drink, and that one may lawfully have them—all this you undertake?"¹

¹ *Illas capras hodie recte esse et bibere. posse habereque recte licere, hæc spondeas!* (Varro, de R. R. 2, 3, 5; D. 19, 1, 11, 4.)

"That those swine are sound, and that one may lawfully have them, and be guaranteed against all damage done by them; and that they are not from a tainted herd (and have got over the fever and flux)—all this you undertake?"¹

These stipulations contain no penalty; and it may be inferred that they would not have been made if the law had implied in every sale a warranty against undisclosed faults. It would thus appear that about B.C. 150 the obligation of warranty existed only when it was made expressly by stipulation.

The next step was taken by the Curule Ædile, who had jurisdiction over the markets, and naturally took a special interest in the law of sale. The reason for his intervention is manifest. The seller knows, or at least has the means of knowing, what are the faults in the thing sold, but his interest is to conceal them in order to effect a sale or enhance the price; the buyer, on the other hand, has the strongest interest in knowing the exact worth of the thing sold, but his opportunities of knowing are very slender. (D. 21, 1, 1, 1.) There is, therefore, nothing unfair in throwing upon the seller the obligation of disclosing any important defects in the thing he wishes to sell. This is especially important in the sale of animals and slaves. Slaves were common and valuable articles of merchandise, and they were liable to have serious undisclosed faults. It would have been very inconvenient if it had been as dangerous to buy a slave in Rome as it is to buy a horse in England.

I. The effect of the edict of the Curule Ædile was to impose on the seller an obligation to warrant the absence of certain faults in slaves, animals, and other things, with or without a stipulation. (D. 21, 1, 31, 20; C. 4, 49, 14.) If the seller did not do so, and faults were subsequently disclosed, then the sale would be rescinded, or a deduction made from the price, in the option of the buyer. (D. 21, 1, 48, 1.)

"Those that are selling slaves shall inform the buyers what disease or defect each has; which is a runaway or wanderer, or still liable to be claimed for some wrong. And all those things they shall, as in duty bound, when the slave comes to be actually sold, openly and clearly declare. If a slave has been sold despite the foregoing, or has been in a state altogether different from what was promised, with or without stipulation, at the sale, and

¹ *Illasce sues sanas esse habereque recte licere noxasque praestari neque de pecore morbooso, esse spondesne?* To which some add—*perfunctas esse a febris et a foria.* (D. 21, 2, 30; Varro, de R. R. 2, 4, 5.)

it is alleged that in that respect a warranty ought to have been given, we shall give an action to cancel the sale not only to the buyer, but to all to whom that property belongs. On the other hand, if the slave has been impaired in value after the sale and delivery by an act of the buyer or his agent or household; or if any offspring of it has been acquired after the sale; or if there has been any accessory to it in the sale, or the buyer has gathered any fruit,—all shall be restored.

“Likewise, if a slave has committed a capital offence, or attempted suicide, or been sent to the amphitheatre to fight with wild beasts, all these things shall be mentioned in the sale; and if they are not, the seller shall be liable to an action.

“Still more: if any one knowingly has offended in the premises, and sold a slave that he knows to be diseased or vicious, he shall be liable to an action.” (D. 21, 1, 1, 1.)

“The sellers of beasts of burden shall openly and plainly declare what disease or defect each has; and as they are sold equipped in their best harness, so shall they be delivered to the buyer. If any one offends in the foregoing, we shall give actions against him as follows:—For the restitution of the harness, or cancelling the sale because of its non-delivery, within sixty days; for disease or defect, to cancel the sale, within six months; for disease or defect, to obtain a deduction of the price, within one year.

“If a pair of beasts of burden are sold together, and the sale is liable to be cancelled for one, the other may be returned.” (D. 21, 1, 38, pr.)

“In all that herein relates to the soundness of beasts of burden, the same shall be observed in regard to all other cattle.” (D. 21, 1, 38, 5.)

The terms of the edicts differ, but the times mentioned in the edict relating to beasts of burden were transferred to the sale of slaves (Paul, Sent. 2, 17, 5); and substantially the two edicts may be read together. (D. 21, 1, 38, 2.) In order that the edicts should apply, the following conditions must exist: (1) The fault must exist at the time of the contract (C. 4, 58, 3); and (2) the buyer must be ignorant of the fault, although ignorance of the seller is no excuse. (D. 21, 1, 48, 4; D. 21, 1, 6; D. 21, 1, 51, pr.)

Morbus (disease).—Sabinus defines it as “an abnormal condition of the body, which impairs its usefulness” (*morbus est habitus cujusque corporis contra naturam, qui usum ejus facit deteriorem*). Disease may be in the body generally, as fever; or in some part only, as blindness and lameness. (D. 21, 1, 1, 8.)

The want of teeth is not a disease, says Labeo, for then all newborn children would be diseased. (D. 21, 1, 11.)

Labeo thought the sterility of a female slave was a disease, within the meaning of the edict; but Trebatius said it was not, if it did not arise from some special disease. (D. 21, 1, 14, 3.)

Vitium (defect) is distinguished from disease. All disease is defect, but all defect is not disease. (D. 21, 1, 17.) *Morbus* is a temporary, *vitium* is a permanent and inherent defect (D. 50, 16, 101, 2), as a one-eyed or stammering slave, a biting or kicking horse, an ox that gores. (D. 21, 1, 1, 7; D. 21, 1, 4, 3.)

In regard to both *morbus* and *vitium*, it is to be observed that they included only defects of the body, not of the mind, unless the mental defect clearly arose from some bodily ailment (D. 21, 1, 4, 2; D. 21, 1, 4, 3; D. 21, 1, 19; D. 21, 1, 4, 1); and even of the bodily ailments, only those sufficiently serious to impair the usefulness of the slave or animal. (D. 21, 1, 1, 8; D. 21, 1, 4, 6; D. 21, 1, 6, 1; D. 21, 1, 10, 2.)

Fugitivus and *erro* (runaway and wanderer). A runaway is one that escapes beyond the reach of his master, with the intention of deserting his service. (D. 21, 1, 17, pr.) There must be an intention to desert (D. 21, 1, 17, 3), and an actual escape beyond the control of his master. (D. 21, 1, 17, 13.)

Erro or wanderer is one that is in the habit of staying away from home, wandering about with no particular object, and returning home after a time. (D. 21, 1, 17, 14.)

The edict mentions a runaway, but not a thief (*fur*). This seems a curious inconsistency, a thief being scarcely less objectionable than a runaway. The reason assigned is that a thief may be peaceably possessed; but the vice of running away is one inconsistent with the possession of the slave (*habere licere*). (D. 19, 1, 13, 1.)

Vitium noxae.—In consequence of the rule that the responsibility for a slave's delict attaches to his master at the time of action brought, it was not safe to buy a slave without a special warranty that no such liability was attached to the slave. (D. 21, 1, 17, 18.)

Another fault seems to have been included in the edict; not to sell an old hand for a new (*ne veterator pro novicio veneat*), (D. 21, 1, 37); the temptation was of course to represent a slave as more docile, in order to enhance the price. (D. 21, 1, 65, 2.)

It seems also that the seller was bound to disclose the nationality of the slave, otherwise the sale might be cancelled; for the nationality was often a most material circumstance in the selection of a slave. (D. 21, 1, 31, 21.)

An extension was given to the edict by the interpretation of the jurists. The edict, in terms, specifies certain faults that must be disclosed, and requires a warranty to be given orally, with or without stipulation (*dictum promissumve*). The jurists held that a warranty in respect of faults not specified in the edict, given orally with or without stipulation, should have the same effect as a warranty given under the terms of the edict. (D. 21, 1, 18.) Hence, if any one affirmed anything of a slave that was not true, or denied anything that was true, as saying that he was not a thief when he was, or that he was a skilled workman when he was not, then an action lay against him. (D. 21, 1, 17, 20.)

But every recommendation of his goods by a seller was not construed into a warranty. Language of mere praise was scrupulously distinguished from promises intended to create a liability. (D. 21, 1, 19.) If a seller said his slave was steady,

you were not to expect the gravity and sobriety of a philosopher; if he said the slave was active and vigilant, it was not to be supposed that he worked night and day. (D. 21, 1, 18, pr.) So, if the slave was said to be an artificer, you must only expect what was ordinarily looked for in an artificer. (D. 21, 1, 19, 4.)

The edict, so far as its exact terms have been preserved to us, applies only to slaves and cattle (*res se moventes*), not to moveables, and still less to immoveables. We are assured, however, by Ulpian, that it included all these classes of things. (D. 21, 1, 1, pr.; D. 21, 1, 63.) An example is given in the Digest (D. 21, 1, 49) of pestilential land, the sale of which might be cancelled, and another in the Code (C. 4, 58, 4) of land bearing poisonous herbs or grass.

Again, when a vessel was sold there was an implied warranty of its soundness. (D. 19, 1, 6, 4.) But this decision was not arrived at without a conflict of opinion; Labeo and Pomponius held that there was an implied warranty, Sabinus that there was not.

B. Duties imposed on the Seller by Special Agreement.

1. It was entirely in the power of the parties to define the quantity or extent of the thing sold, or to reserve rights for the seller. Thus the seller might reserve a usufruct or *habitationis*. (D. 19, 1, 53, 2; D. 9, 1, 7.) On the other hand, he might warrant the absence of any servitude (*uti optimus maximusque est*). (D. 50, 16, 169; D. 50, 16, 90.) Again, *rutu caesa*, which, unless specially mentioned, are not included in the sale, might be added. (D. 19, 1, 17, 6.) On the other hand, the seller might reserve all the edible fruit (*pomum*) or the quarries (*lapicidinae*) on the land. (D. 50, 16, 205; D. 18, 1, 77.) But personal obligations, not falling within the class of praedial servitudes, could not be imposed.

Illustration.

Lucius Titius promised to give annually out of his lands 100,000 *modii* of corn to the owner of the lands of Gaius Seius. He sold the farm, with an express clause that the land was sold subject to all burdens (*quo jure quaque conditione ea praedia Lucii hodie sunt, ita vaeneunt, itaque habebuntur*). Notwithstanding this agreement, the buyer was not bound to supply the 100,000 *modii* of grain annually. This obligation is not a *servitus*. (D. 18, 1, 18 1.)

2. The seller may, by agreement, make himself responsible for the accidental loss of the thing sold, or liable only for

misconduct (*dolus*), not for ~~for~~ due care (*culpa* and *diligentia*). (D. 18, 1, 35, 4.)

3. Every seller was bound to promise a penalty of double the price on eviction, unless it was part of the bargain that he should not make that promise. (D. 21, 2, 37; D. 21, 2, 56; D. 21, 2, 4.) If the seller bargains that he shall not pay compensation in the event of the buyer being evicted, he is not obliged to pay damages, but he is bound to restore the price paid if the buyer is evicted. (D. 21, 2, 69, pr.; D. 19, 1, 11, 18.)

4. By no agreement between the parties can the seller be exempted from responsibility for cheating (*dolus*). (D. 13, 6, 17.)

Illustrations.

Titius sells a thing that he knows is not his own, and bargains to be exempt from responsibility for eviction; such a bargain is void. (D. 19, 1, 69.)

Titius sold a slave, saying in a general way that he was a *statuliber*, but concealing the condition of his liberty, which he well knew. This agreement does not diminish his responsibility. (D. 21, 2, 69, 5.)

Titius, knowing that his land was subject to a particular servitude, made a special agreement that he would not be responsible for any servitude that might be found. This agreement notwithstanding, he must give compensation for the servitude. (D. 19, 1, 1, 1; D. 21, 2, 69, 5.)

5. By express agreement the seller might bind himself to give sureties as well as a formal stipulation in case of eviction. (D. 21, 2, 4.)

DUTIES OF BUYER (*Emptor*) = RIGHTS in *personam* OF SELLER (*Venditor*).

A. Duties imposed upon the Buyer without Special Agreement.

1. The buyer must pay the price agreed upon. He is bound not merely to deliver the money, but to give a good title to it. (D. 19, 1, 11, 2.) Thus a payment of the price with money belonging to the seller is no payment at all. (C. 4, 49, 7.)

If the buyer does not pay on delivery of the thing sold, and has not got credit, he must pay interest. (D. 19, 1, 13, 20; D. 19, 1, 13, 21; Paul, Sent. 2, 17, 9.) If credit has been given, interest is due from the expiration of the credit. If, before the money is paid, the ownership of the thing sold is called in question, the buyer is not bound to pay, unless sureties of the highest trustworthiness are offered in case of eviction. (Vat. Frag. 12; D. 18, 6, 18, 1.)

2. The buyer ought to accept delivery; and he may be com-

pelled to remove what he has bought by the *actio ex vendito*. (D. 19, 1, 9.)

3. The buyer must pay the expenses the seller is put to in keeping the thing sold prior to delivery—as, *e. g.*, repairing a house, providing medical attendance or teaching to a slave, or the expenses of burying a slave (D. 19, 1, 13, 22), and generally expenditure honestly and properly incurred. (C. 4, 49, 16.) The seller must, however, furnish a slave sold with food, if he has the services of the slave, and the buyer does not make delay in receiving the slave. (D. 19, 1, 38, 1.)

B. Duties imposed on the Buyer by Special Agreement.

1. Right of pre-emption to seller (*pactum protimiseos*). On a sale, a seller could bargain that the buyer should not sell the thing to any one except himself. (D. 18, 1, 75; D. 19, 1, 21, 5.)

2. The seller might make it a term of the contract, that the thing sold should be let to him at a given rent. (D. 19, 1, 21, 4.)

3. It might be agreed that a female slave should not be employed for immoral purposes. (C. 4, 56, 3.) The seller could not after the sale withdraw the condition; and a violation of it enabled the slave to claim her freedom. (C. 4, 56, 1.)

4. A slave might be sold with the condition that he should be removed from a certain district. (D. 18, 7, 5; C. 4, 55, 5.)

5. A slave might be sold on condition that he should be manumitted. (C. 4, 57, 6.) To these examples many more might be added if it were necessary. Often these special duties were imposed by stipulation, especially when a penalty was added; but a mere oral agreement without stipulation was perfectly valid.

INVESTITIVE FACTS.

The contract of sale is made as soon as the price is agreed on, although it is not as yet paid over, nor even an earnest given; for what is given as an earnest is a proof (not a part) of the contract of sale. This ought to hold only in the case of unwritten contracts of sale; for in such sales we have made no change. But in those that are made by writing, we have determined that the sale is not complete unless instruments of sale are written out by the contracting parties; or, if written by another, signed by the maker of the contract; and that if made through a *tabellio* (notary), the sale is not completed unless the writings are fully finished in every part. For as long as any of these conditions is wanting there is room to draw back, and either seller or purchaser can retire from the purchase with impunity. But we have allowed them so to retire only if nothing has been given as earnest. But if this has followed on the agreement, then whether the sale has been formally put in writing or not, he that refuses to fulfil the contract, if he is the buyer, loses what he has given; and if the seller, is forced to restore double, although nothing was expressly said about the earnest. (J. 3, 23, pr.; G. 3, 139.)

The earnest (*arrhae*), if not part of the price, was to be returned on the completion of the sale. (D. 19, 1, 11, 6; D. 18, 3, 8.) Often a ring was given. (D. 18, 1, 35, pr.; D. 14, 3, 5, 15.) The advantages of earnest were these: (1) it marked off the stage of mere proposals from that of a definite agreement; (2) the forfeiture of the earnest was an inducement to the faithful performance of the contract. A somewhat difficult question of interpretation arises with reference to the constitution mentioned by Justinian. In the case of contracts to be reduced to writing, there was liberty to withdraw up to the actual writing. If in such a case earnest was given, the party withdrawing forfeits the earnest. Now Justinian seems to put both written and unwritten agreements on this footing, that by forfeiting the earnest either party could withdraw from the contract. The object of earnest is to *bind* the contract, but such a rule would have made it a way of *losing* the contract, and therefore seems inconsistent with its nature. Savigny thinks the explanation is this: that in contracts not to be written, the party who withdraws forfeits the earnest, in addition to being subject to an action on the sale.

REMEDIES.

A. To Enforce the Duties of the Seller.

I. *Actio Empti*.—This was an action by which the seller could be compelled to perform his obligations or pay compensation. It was necessary, however, that the buyer should have paid the price, or at least made a tender of it. (D. 19, 1, 13, 8.)

By this action also were enforced all special agreements (*pacta*) made in the contract of sale. (D. 18, 1, 68; D. 18, 1, 40, 1.)

II. *Actio Redhibitoria*.—This was the action given by the edict of the Ædile to cancel a sale in consequence of faults in the thing sold. (D. 21, 1, 23, 7; D. 21, 1, 60.) It could be brought by the buyer, or by any universal successor. (D. 21, 1, 23, 5; D. 50, 16, 17, 1; D. 21, 1, 19, 5.) The object was twofold—(1) complete restitution to the seller of the thing sold, with all its produce and accessories; and (2) to give the buyer the price, with interest, as an equivalent for the restitution of the produce. (D. 21, 1, 31, 2; D. 21, 1, 23, 9; D. 21, 1, 27; D. 21, 1, 29, 2.) The seller was required to restore the price before the buyer delivered up the things sold. (D. 21, 1, 25, 10; D. 21, 1, 26.)

The action must be brought within one year.

III. *Actio aestimatoria seu quanti minoris*.—This action is brought to reduce the price, not to cancel the sale. When this action was used, it was, however, in the power of the *iudex* to cancel the sale. (D. 21, 1, 43, 6.)

This action must be brought within six months.

IV. *Actio ex stipulatu* or *condictio certi*: when a promise had been made by stipulation.

B. To Enforce the Duties of the Buyer.

I. *Actio Venditi*.—This was the remedy of the seller, by which he could compel the buyer to observe his duties, whether those were inherent in the contract, or added by special agreement as part of the sale. (D. 18, 1, 75; D. 19, 1, 11, 1.)

II.—HIRE (*LOCATIO CONDUCTIO*).

DEFINITION.

In *locatio conductio* one person (*locator*) agrees to give to another (*conductor*) the use of something, or to do some work, in return for a fixed sum (*merces certa*). (D. 19, 2, 1; D. 19, 2, 22, 1; Paul, Sent. 2, 18, 1.)

The contract of letting on hire is very like that of sale, and rests on the same rules of law : for as the contract of sale is made by agreeing on a price, so there is understood to be a contract of letting on hire when the amount to be paid is fixed. The *actio locati* is open to the letter ; the *actio conducti* to the hirer. (J. 3, 24 pr. ; G. 3, 142.)

Moreover, just as it was a common question whether barter was a contract of sale, so a question used to be raised with regard to letting on hire. The case put was this :—A man gives you something to use or enjoy, and receives something else from you in turn to use or enjoy. Now, it is held that this is not a letting on hire, but a distinct kind of contract. If, for instance, a man has one ox and his neighbour too has one, and they mutually agree that each shall lend the other his ox free every ten days in turn, to do their work, and one ox dies while not in his owner's care, then no *actio locati* or *conducti* or *commodati* is open to the owner, for the loan was not gratuitous ; but he must bring an *actio praescriptis verbis*. (J. 3, 24, 2 ; G. 3, 144.)

Part of the sum may be paid in goods, as when the landlord agrees to accept so much corn for a portion of the rent. If, however, the whole rent is in kind, it is not *locatio conductio*. (D. 19, 2, 19, 3.)

The price must be substantial. If the payment were a single coin, there would be a gift, not a letting for hire. (D. 19, 2, 46 ; D. 19, 2, 20, 1.) Hence a letting to a wife for a mere trifle, as a favour to her, is void, as being a prohibited donation. (D. 24, 1, 52.) But the amount was not to be too narrowly scrutinised if there was no fraud, and the intention of the parties was to have a real letting, and not a gift. (D. 19, 2, 22, 3 ; D. 19, 2, 23.)

All we have said above (in regard to sale) about leaving the price to be fixed at the discretion of a third person, must be understood to apply also to letting on hire, if the pay is left to a third person's discretion. Hence, if a man gives clothes to a fuller to clean, or to a tailor to mend, and no sum is fixed to be paid at the time, but he is to give afterwards the sum they agree on, then this is not properly a contract of letting on hire, but gives rise to an *actio praescriptis verbis*. (J. 3, 24, 1 ; G. 3, 143.)

Sale differs from letting, as ownership differs from a temporary use.

If I deliver to you gladiators on these terms, that for each man that comes out unhurt I shall be given twenty *denarii* as the price of his toil (*pro sudore*), and for each man that is killed or disabled one thousand *denarii*, it is a question whether this is a contract of sale or of letting on hire. The better opinion is, that as regards those that come out unhurt the contract is one of letting on hire ; but that as regards those that are killed or disabled, it is one of sale. Which it is to turn out in each case depends on accident, just as if the sale or letting on hire were conditional : for there is no doubt now that things can be sold or let out conditionally. (G. 3, 146.)

Another disputed case is this : If Titius agrees with a goldsmith that the goldsmith shall, out of his own gold, make rings of a certain weight and shape, and receive say ten *aurei*, is this a contract of sale or of letting on hire ? Cassius says that it is, as regards the materials, a contract of sale ; as regards the work, of letting on hire. But it is now held that it is a contract of sale

alone. If, however, Titius gave his own gold, and a sum was fixed to be paid for the work, there is no doubt it is a case of letting on hire. (J. 3, 24, 4; G. 3, 147.)

This contract includes the two antithetical objects of all contracts—*things* and *services*. The duties arising out of this contract differ materially, therefore, according as the object is the use of a thing, or the performance of some service. This distinction must be kept in view with reference to a question that cannot be passed over without discussion. What is the true place of the contract of hire? In this work it is placed under the category of rights *in personam*, but is not the interest of a hirer of land such as to require it to be placed, along with usufruct and use, under the law of property? This question does not arise with reference to the hiring of services, and therefore, even if we were bound to transfer the hiring of things to the law of property, we should still be obliged to reserve a place for the hiring of services among contracts. Are we right in placing the hire of things under contract instead of property—under rights *in personam*, instead of under rights *in rem*?

This depends upon the nature of the interest of the hirer (*conductor*). Has the *conductor* of a farm a right *in rem*, or only a right *in personam* against the letter (*locator*), the owner of the land? According to the definition of right *in rem*, it is necessary that the *conductor* should have a right as against all the world to the possession of the land for the time agreed upon. Now, nothing is more certain than that the *conductor* had no such right. In the first place, if the *locator* sold the farm, the buyer could at once evict the *conductor*. (C. 4, 65, 9.) Again, if the landlord bequeathed the farm as a legacy, the legatee could evict the *conductor*, whose only remedy was an action for damages against the heir. (D. 19, 2, 32.) But even the landlord (*locator*) himself was not bound absolutely to allow the *conductor* possession, for if he could show that he wanted the house let for his own accommodation, he could evict the *conductor* without giving him any compensation. (C. 4, 65, 3.) But if a farm forms part of a dowry, and is let out by the husband for a fixed time, the wife cannot reclaim the farm without giving security that she will leave the tenant-farmer in quiet enjoyment, provided only she receives the rents. (D. 33, 4, 1, 15; D. 24, 3, 25, 4.)

The right of a *conductor* may be contrasted with the interest of a usufructuary. A *conductor* could not bring an action of theft against a person that had stolen growing crop (D. 19, 2, 60, 5), or had secretly dug for and carried away minerals. (D. 47, 2, 52, 8.) The owner (*locator*) was, however, bound to sue the thief, and hand over the proceeds to the *conductor*. On the other hand, the usufructuary, although he had no right to the crop before it was gathered, had, nevertheless, such an interest in the land as to enable him to bring an action for theft. Hence, although he was not owner of the stolen produce, and therefore could not bring the *condictio furtiva*, he was regarded as having a right to the possession, which was violated by the theft. (D. 7, 1, 12, 5.) It is true that the *conductor* of a moveable had the *actio furti* when the moveable was stolen, but that was in consequence of his being responsible for the loss of the thing. (J. 4, 1, 15.)

The true position of the *conductor* appears by contrast with the holder of a *superficies* (p. 259.) For his protection a special interdict was invented (D. 43, 18, 1, pr.); and also, if he were not in possession, a praetorian action *in rem*. We are told that this action was provided because it was uncertain whether an action for letting would lie—precisely the same controversy that existed in the analogous case of *Emphyteusis*, and which was settled by the Emperor Zeno. (D. 43, 18, 1, 1.) Another text from the same passage describes the contrast between *superficies* and the contract of *locatio-conductio*. *Superficies* was a right either perpetual or granted for a very long time; and Ulpian goes on to say that that was the test by which the Praetor discriminated between *superficies* and a simple contract of hire. If, says Ulpian, a person

hired a *superficies* for a short time, no action *in rem* would be given ; but if it were for a long time, such a remedy would be given. (D. 43, 18, 1, 3.) The letting of farms was usually limited to five years. (D. 19, 2, 9, 2 ; D. 19, 2, 24, 2 ; C. 4, 65, 7.) Considering that it was a disputed point whether the *actio ex locato* would lie in the case of *superficies*, there can be no hesitation in affirming that the actions *in rem* were given only in the case of a perpetual interest in the land, or one lasting at least for a considerable time.

Lastly, the tenant-farmer was not a possessor (p. 210), and therefore could not avail himself of the Interdicts. This fact, taken along with another, that the farmer had no *quasi-actio in rem*, conclusively proves that his interest belongs to the class of rights *in personam*.

RIGHTS AND DUTIES.

First, *Locatio-conductio* OF THINGS.

The following terms were generally employed to designate the parties. The hirer (*conductor*) of a house (*praedium urbanum*) was called *inquilinus*, and the rent he paid was called *pensio*. The hirer (*conductor*) of a farm (*praedium rusticum*) was called *colonus*, and the rent he paid *reditus*.

Duties of *locator* of things = rights *in personam* of *conductor* (*inquilinus* or *colonus*).

I. To deliver the thing to the hirer, and to permit him to keep it for the time agreed upon. (D. 19, 2, 9 ; D. 19, 2, 15, 8.) The hirer may sublet. (D. 19, 2, 48 ; C. 4, 65, 6.)

The responsibility incurred by an owner (*locator*) who does not perform this duty, varies according as his non-performance arises from his fault or not. If he fails in consequence of his own fault, he must pay full compensation (*id quod interest*). (D. 19, 2, 30, pr.)

Titius lets a farm to Seius for five years. At the end of two years Titius sells the same farm to Sempronius, who turns Seius out. Titius must pay Seius compensation for the eviction. He could have protected himself, however, by making it a condition of sale that Sempronius should allow Seius to remain for the rest of his tenancy. (D. 19, 2, 25, 1.)

If, however, it is through no fault of the owner that the hirer is evicted, the latter is entitled only to a remission of the rent.

Illustrations.

Gallus buys a house from a person in possession, whom he has every reason to believe to be owner. He then lets the house to Maevius. Soon after, the true owner brings an action against Gallus, and, succeeding in it, evicts Maevius. Maevius has an action against Gallus ; but if the latter offers Maevius equally good accommodation elsewhere, he is entitled to be absolved from the action. (D. 19, 2, 9, pr.)

Titius lets a farm to Gaius, and the farm is confiscated. Gaius is entitled only to a remission of the rent, not to damages for the non-enjoyment. (D. 19, 2, 33.)

If a house is burned down, the tenant (*inquilinus*) is not bound to pay any rent after the fire. (D. 19, 2, 30, 1.)

If the thing let is carried off by robbers, the owner is bound to remit payment for the unexpired term of the contract. (D. 19, 2, 34.)

A landlord, during the currency of a lease, resolves to pull down the house and rebuild it. If there is no necessity for this step, he must give the tenant compensation (*id quod interest*); but if it is necessary, he must allow simply a remission of the rent. (D. 19, 2, 35, pr.)

Titius lets a farm to Gaius for five years. At the end of two years Titius dies, leaving Sempronius his heir, and bequeathing a usufruct of the farm to Gaius. Gaius is absolved from the further payment of rent (D. 7, 1, 34, 1), and the heir is bound to release Gaius from the contract. (D. 33, 2, 30, 1.)

II. The owner is bound to keep the thing in a state such that the hirer can enjoy the use agreed upon. If the thing becomes deteriorated, and is not repaired, the hirer may demand a reduction of the rent or a release from the contract. Trifling repairs must, however, be executed by the hirer. (D. 19, 2, 27.)

Titius lets a house to Gaius, and Sempronius, an adjoining proprietor, builds and shuts out his light. Gaius may throw up the contract. So if the doors and windows decay, and are not repaired. (D. 19, 2, 25, 2.)

III. The landlord (*locator*) must see that there are no faults in the thing let likely to cause damage. If he does not, he must pay for the injuries resulting. (D. 19, 2, 19, 1.)

Illustrations.

Titius lets a farm to Gaius along with the large jars or vats (*dolia*) used in wine-making. The vats are rotten, and Gaius loses his wine. Titius must pay for the wine. (D. 19, 2, 19, 1.)

Titius lets pasture-land that produces poisonous or injurious herbs. If Titius is not aware of the fault, he is bound merely to remit the rent; but if he did know, he must pay all the damages that may result. (D. 19, 2, 19, 1.)

Gaius hired Stichus the slave of Titius to drive his mules. By the negligence of Stichus a mule was killed. Must Titius pay for the mule? If the contract was made with Stichus and not with Titius, Titius must pay the damage to the whole extent of the slave's *peculium*, and also so far as he has drawn profit from the letting. But if Titius himself let the slave, he is not responsible if he exercised due care in selecting Stichus for the work. (D. 19, 2, 60, 7.) Generally, however, in such cases, the hirer had an action *ex delicto*. Thus, if a slave was let out to keep a shop and stole anything, the hirer could sue his master for the theft, and compel him either to pay him the value of the things stolen, or to surrender the slave (*noxae deditio*). (D. 19, 2, 45, 1.)

IV. The owner must permit the hirer to carry away any moveables he has brought on the land or house, and even fixtures, provided he promises (by stipulation) not to injure the house, but to leave it in as good condition as before. (D. 19, 2, 19, 4.) (See p. 132.)

DUTIES OF HIRER OF THINGS (*inquilinus, colonus*) = RIGHTS
in *personam* of *locator*.

A. In the Absence of Special Agreement.

1. To pay the rent agreed upon (*pensio, redditus, merces*) and interest, if the payment falls in arrear. (D. 22, 1, 17, 4; C. 4, 65, 17.) If the rent of a house or farm were in arrears for two years, the hirer could be evicted. (D. 19, 2, 54, 1.)

EXCEPTION.—In certain cases the hirer was entitled to a remission of rent, in whole or in part, even when there was no misconduct on the part of the *locator*. (D. 19, 2, 15, 2.)

Thus when a house needs repair, and the landlord requires the tenant to leave during the repairs, the tenant pays no rent; and if the tenant is kept out for more than six months, he can throw up his tenancy. (D. 19, 2, 60, pr.)

In other cases a remission was allowed on account of loss or damage to crops, but only when the damage was serious (D. 19, 2, 25, 6); and was not compensated by particularly good harvests in other years of the tenancy (C. 4, 65, 8); and when the risk was not thrown upon the tenant either by the custom of the place or by special agreement. (D. 19, 2, 15, 4; C. 4, 65, 19.) Subject to these limitations, the landlord was obliged to forego even the whole of his rent when the crop was lost or very much destroyed by inundations, tempests, hostile invasions, wind or rain. Allowance was also made for the depredations of locusts (C. 4, 65, 18), jackdaws, starlings, and for the blight. (D. 19, 2, 15, 2.)

II. The hirer must keep possession of the thing for the time agreed upon. If without a reasonable excuse he leaves the house or land, he must nevertheless continue to pay rent. (D. 19, 2, 24, 2; D. 19, 2, 55, 2.) If the tenant has reason to fear that the house will fall down, he is absolved from paying the rent. (D. 19, 2, 27, 1.)

III. The hirer must take all reasonable care of the thing hired, but he is not responsible for accident. (C. 4, 65, 28.) He is responsible if the thing is stolen (J. 4, 1, 15), but not if it is carried away by robbers. (D. 19, 2, 9, 4.)

The hirer ought to do everything according to the terms of his hiring; and if anything is passed over in the terms, he ought to render in that case what is just and fair.

When it is for the use of garments, or silver, or beasts, that a man has made or promised payment, he is required to guard those with all the care that the most diligent head of a house employs in regard to property of his own. If he does this and yet by some mishap loses the property, he will not be bound to restore it. (J. 3, 24, 5.)

Illustrations.

Gaius hires from Titius weights, which are broken by the *Ædile* for being unfair. Must Gaius make good their value? If he hired them for good weights, he is released; but if he knew they were light weights, he must pay their value. (D. 19, 2, 13, 8.)

Titius lets two mules to Gaius, and guarantees that they will carry a certain weight. Maevius overloaded the mules, and they were injured. Gaius may be sued for breach of contract, and Maevius for *damnum injuria*. (D. 19, 2, 30, 2.)

A shipmaster proceeds on a river without a rudder. A storm arises, and the boat is lost. He is responsible to the passengers for the damage they sustain, upon the contract of hire. (D. 19, 2, 15, 2.)

A shipowner has agreed to carry goods to *Minturnae*, but finding the river too shallow, transfers the goods to a boat belonging to another owner. The boat is lost at the mouth of the river. Which of the owners is responsible? Upon this point opinion did not seem to be quite agreed. Labeo says the owner of the first vessel is not responsible unless he was in fault; but he is if he transferred the goods without the consent of the owner, or at a time when he ought not, or the second vessel is unseaworthy. Paul, however, says that the owner of the first vessel is not responsible unless he has been negligent. (D. 19, 2, 13, 1.)

IV. The hirer must return the thing at the time agreed upon. The hirer was bound to give up possession, even if he claimed the property as his own. After surrendering possession, he could, if he liked, institute an action for the recovery of it: (C. 4, 65, 25.) Zeno made it an offence punishable with fine or exile for a tenant to contest the title of his landlord without yielding up possession. (C. 4, 65, 32.)

B. By Special Agreement.

1. An agreement that the hirer shall not keep a fire (*ignem ne habeto*), made him answerable when the house was lost by accident, if he kept a fire. (D. 19, 2, 11, 1.)

2. An agreement that the hirer will not fell, peel, or burn the trees, nor suffer it to be done, imposes on him the obligation not only of stopping a person that does it, but of taking means to prevent any one doing it. (D. 19, 2, 29.)

3. A penalty was often added to the obligation to keep possession for the time agreed upon, corresponding to the penalty on the *locator*, for eviction. (D. 19, 2, 54, 1.)

4. It may be agreed that if a farm is not cultivated in the manner prescribed by the contract, the landlord may turn out the tenant and let the farm to another, and that the tenant in that case should make up the rent if the landlord could not get the same rent as before. If, however, the land fetched more, the tenant could not recover the excess, because it was held that the agreement was meant for the benefit of the landlord only. (D. 19, 2, 51.)

Second, *Locatio-conductio* OF SERVICES (*operarum*).

If the material upon which labour is to be employed is contributed by the workman, the contract is one of sale, not of hire. The hire of services exists only when the workman gives his services, and nothing more, and all the material is contributed by

his employer. (J. 3, 24, 4.) But a distinction was made among services. Sometimes a service consists in making an article, as a gold ring out of gold. Sometimes a service has no reference to any corporeal thing, as the carrying of a verbal message. In this last case there can be no dispute as to which is hirer and which letter. The object of the contract is service; the servant gives the service, and the employer pays for it; the servant is the letter (*locator operarum*), and the employer, the hirer of the service, is *conductor operarum*. Thus a secretary was said to let his services, and his employer to hire them. (D. 19, 2, 19, 9; D. 19, 2, 38.) But a difficulty arose when the work was rendered in respect of a thing. Suppose clothes are sent to be washed, essentially the same relation exists as in personal services; the laundress cleans the clothes, and the owner pays her. But the Roman jurists in this case said the laundress was the hirer (*conductor* or *redemptor operis*), and the owner was the letter (*locator operis*). The usage of the jurists is distinct and uniform.¹ But it proceeds upon a confusion with the quite different case of letting things for use. The landlord is the letter (*locator*), and the tenant the hirer (*conductor*). But this resemblance is extremely superficial. If the jurists had followed the test of payment, it would have kept them right. The tenant pays, and is the hirer (*conductor*); in like manner a person that sends his slave to be taught, pays for and hires the services of the teacher. To avoid this source of confusion, it is convenient to speak simply of the employer and the workman.

DUTIES OF WORKMAN (*locator operarum, conductor operis*) = RIGHTS in personam OF EMPLOYER (*conductor operarum, locator operis*).

A. In the Absence of Special Agreement.

I. The workman was bound to execute the work properly, and in the manner agreed upon, within a reasonable time. (D. 19, 2, 51, 1; D. 19, 2, 60, 3; D. 19, 2, 58, 1.)

From the rules in *locatio conductio* of things, it may be inferred that if the workman was not in fault (as if disabled) he simply lost his wages; but if he were in fault, he must pay full compensation (*id quod interest*).

II. The workman must take good care (*praestare diligentiam, culpam*) of the things entrusted to him; and he is bound to pay their value, if the things are lost or destroyed through his negligence or unskilfulness. But generally he is not answerable for loss arising from *vis major*, as robbery; or from faults in the thing upon which he is working. (D. 19, 2, 62; D. 19, 2, 59; D. 19, 2, 9, 5; D. 13, 6, 19; D. 19, 2, 41.)

Illustrations.

A workman has agreed to take a column from one place and set it up in another, or to remove casks of wine. If the column or casks are broken, the workman is not

¹ The fuller (*fullo*) of clothes is *conductor*; the owner of clothes *locator*. (D. 19, 2, 9, 5; D. 19, 2, 13, 6; D. 19, 2, 60, 2.)

The carrier is *conductor*; and the owner of the thing *locator*. (D. 19, 2, 11, 3; D. 19, 2, 25, 7.)

A person that teaches a slave is *conductor*; the owner is *locator*. (D. 19, 2, 13, 3.)

A jeweller or builder that executes work is a *conductor*, and the person for whom and with whose material the work is done is *locator operis*. (D. 19, 2, 13, 5; D. 19, 2, 59; D. 19, 2, 62.)

bound to pay their value unless he was in fault; and he was in fault if he did not exercise the highest degree of care. (D. 19, 2, 25, 7.)

A builder undertakes to put up a house with the owner's own material. After it is partly up, it is destroyed by an earthquake: the loss falls on the owner. (D. 19, 2, 59.)

A precious stone is sent to a lapidary to be cut or set. In doing so the lapidary breaks the stone. He is bound to pay damages if the fracture was due to his unskilfulness, but not if it was due to a flaw in the stone. (D. 19, 2, 13, 5.)

A fuller receives clothes to be cleaned; the clothes are eaten by vermin, or stolen, or returned to the wrong person. The fuller must pay their value. (D. 19, 2, 13, 6; D. 19, 2, 25, 8.)

A coachman, in racing another, overturned his own carriage, and broke the leg of a slave whom he had undertaken to carry. He is liable either in an action on the Aquilian law for negligence, or on the contract. (D. 19, 2, 13, pr.)

In some cases, however, the workman accepts a larger responsibility.

1. When work is let by the job (*en bloc, per aversionem*), it remains at the risk of the workman until approved. (D. 19, 2, 36.)

2. When work is to be paid for by so many feet or according to measure, the risk is with the workman until the measure is made. (D. 19, 2, 36.)

In both cases, however, the workman is free from risk, if it is by the fault of the employer that the thing is not approved or measured. Also if the work requiring to be approved perishes by *vis major* before approval, the loss falls on the employer, because the workman is not responsible for more than his own care and skill. (D. 19, 2, 36.)

B. By Special Agreement.

1. The workman, by agreement, might undertake to bear the loss resulting from accident. (D. 19, 2, 13, 5.)

Illustrations.

A warehouseman put up a notice that he would not accept gold, silver, or pearls at his own risk. Such articles were, however, entrusted to his care, with his knowledge. This acceptance was held to be a renunciation of the notice. (D. 19, 2, 60, 6.)

Warehousemen (*horrearii*) were bound to take special care and unusual precautions, but if their utmost care failed to frustrate the attempts of robbers, they were exonerated. (C. 4, 65, 1; C. 4, 65, 4; D. 19, 2, 40.)

2. An agreement that the work must be to the satisfaction of the employer (*ut arbitrato domini opus approbetur*) was construed as if it said according to the satisfaction of a fair and reasonable man (*virī boni arbitrium*). It applies only to the quality of the work, and not to the time allowed for doing it. (D. 19, 2, 24.)

3. An agreement was sometimes made that if the work was not done by a certain day, it might be taken away and given to another. The employer cannot take it away until the day passes, and the workman is not liable to be sued until the work has actually been given to another. (D. 19, 2, 13, 10.)

DUTY OF THE EMPLOYER (*conductor operarum*, or *locator operis*)
= Right in *personam* OF WORKMAN (*locator operarum*, or
conductor operis).

To pay the wages agreed upon, unless through the fault of the workman the services promised have not been given. (D. 19, 2, 38, pr.) If the wages were not paid in time, interest was due. (C. 4, 65, 17.)

Illustrations.

A secretary was engaged for a year to Antonius Aquila. Before the end of the year Antonius died. If the secretary did not receive any salary during the same year from any other person, he was entitled to his full salary from the heir of the deceased. (D. 19, 2, 19, 9; D. 19, 2, 19, 10.)

An advocate was obliged to return his fee (*honorarium*) if through his own fault he failed to appear in the cause for which he was engaged. (D. 19, 2, 38, 1.)

When a ship was lost, the amount paid as freight could be recovered. (D. 19, 2, 15, 6.)

SPECIAL DIVESTITIVE FACTS.

1. The expiration of the time for which the contract was to last. (C. 4, 65, 11.)

If the hirer of a farm (*colonus*) is permitted by the owner to remain in possession after his five years' lease is exhausted, there is an implied re-letting (*relocatio*) to him of the farm for one year. But in the case of houses, if the original contract was in writing, a re-letting is not presumed, and cannot be made except in writing. In the absence of such writing the tenant holds merely during the pleasure of the owner. (D. 19, 2, 13, 11.)

2. If the interest of the *locator* in the thing let has expired, then the letting is at an end. (D. 19, 2, 9, 1.)

3. The death of a workman puts an end to a hiring of service or work; but the death of a letter or hirer of things does not. (C. 4, 65, 10.)

If the hirer dies during the time of hiring, his heir comes into his place as hirer, and has the same rights and duties. (J. 3, 24, 6.)

4. The hirer may be evicted from a farm, of which he has been in arrears of rent for two years (D. 19, 2, 54, 1), or if he

has misconducted himself in the hiring, or the house let wants repairs, or the landlord requires the house for his own accommodation. (C. 4, 65, 3.)

REMEDIES.

I. To enforce the duties of a landlord (*locator rerum*), and employer (*locator operis*), and workman (*locator operarum*).

1. *Actio conducti*. (D. 19, 2, 15.)

2. *Interdict de migrando*.—This was given only to a hirer of houses (*inquilinus*), to enable him to remove his property from the house on payment of his rent. (D. 43, 32, 1, pr.) It includes also property under his care. (D. 43, 32, 2.) It is a perpetual interdict; and is given to and against heirs. (D. 43, 32, 1, 6.)

II. To enforce the duties of the hirer of things (*conductor rerum*), and the (*conductor operis* (workman), and the *conductor operarum* (employer).

1. *Actio locati*.

2. Real action—such as *actio furti* (D. 19, 2, 42), the action on the Aquilian Law, the interdict *quod vi aut clam*, and the *actio arborum furtim caesarum*. (D. 19, 2, 25, 5; D. 19, 2, 43.)

JETTISON (*LEX RHODIA DE JACTU*).

The Roman Law adopted, so far as not inconsistent with itself, the maritime law of Rhodes. This fact is brought out very forcibly in a rescript of the Emperor Augustus. I am, says he, indeed, master of the land, but the law rules the sea. The Maritime law of Rhodes (*lex Rhodia*) applies whenever it is not opposed to special legislation. (D. 14, 2, 9.)

If, in order to save a ship, a portion of its cargo is thrown overboard, the owner of the vessel and cargo must share with the owners of the goods thrown overboard the loss they sustain. (D. 14, 2, 1.)

Illustrations.

A captain of a ship, fearing that his ship is overloaded, causes a portion of the cargo to be put into boats. The boats are capsized. In this case there is clearly contribution. Suppose, however, the boats are saved and the ship is lost, is there contribution? No, because the goods in the boats have not been saved in consequence of the loss of the goods in the ship. (D. 14, 2, 4.)

A mast is cut and thrown overboard. The owner has a right of contribution if it was done to save the vessel, and the vessel was saved. (D. 14, 2, 3; D. 14, 2, 5.)

A ship suffered severely in a storm, and was driven into a port, where the captain had the damage repaired. Continuing the voyage, the ship reached its destination in safety. In this case there is no contribution for the expenses of repairs, because that was a part of the ordinary expenditure, rather than a loss incurred for the sake of preserving the cargo. (D. 14, 2, 6.)

Money paid for the redemption of a ship from pirates gave rise to a claim for contribution on the cargo, but not if the goods were stolen by robbers. (D. 14, 2, 2, 3.)

There was no contribution for slaves drowned in a shipwreck, any more than if they had died on board or thrown themselves into the sea. (D. 14, 2, 2, 5.)

Contribution is required from those whose property has been saved by the jettison, upon the equitable ground that the loss was incurred to save their goods. (D. 14, 2, 5.) No contribution could be required on account of free persons saved, because their lives constituted a value that could not be expressed in money. But they must contribute on account of their garments and jewellery saved from shipwreck; not, however, for food and the like consumable articles. Also the owner of the vessel must contribute because his vessel is saved. (D. 14, 2, 2, 2.)

A more difficult point is raised by Callistratus. May contribution be demanded in respect of goods which, although saved, have been damaged by the water? The answer was that such goods should contribute according to their depreciated value only.

Suppose the goods were deteriorated to the extent of 10 *aurei*, and the amount due on contribution was less, say 2 *aurei*; is the owner of the damaged goods not only to suffer the loss of 10 *aurei*, but to pay 2 *aurei* for contribution? or may he not claim contribution for the damage done to his own goods? Callistratus, endorsing the opinion of Papirius Fronto, said that contribution should be made not merely for jettison, but, as in the case mentioned, for damage done by sea water. (D. 14, 2, 4, 2.)

Valuation.—In measuring the value of the goods lost and saved for the purpose of contribution, a distinction was drawn. The value of the goods thrown overboard or damaged by sea water, was held to be the price paid for them, not the price that they would probably fetch at the port of destination. The reason was, that although it was fair that the owners of the goods saved should pay for the goods thrown overboard, all that they could reasonably be asked to do was to save the owner from loss, not to make for him a profit. But the goods saved, as was but fair, were valued at the price they would fetch at the port of destination, because that was the true measure of the value of what was saved from shipwreck. (D. 14, 2, 4, 4.)

REMEDIES.—Although in substance the obligation to contribute for goods thrown overboard was founded on equity, and not on contract, and was therefore a real quasi-contract, yet in form such was not the case. The owners of the goods lost had no direct action against the owners whose goods were saved; their remedy was against the shipmaster upon the contract of letting on hire. (D. 14, 2, 2, 2.) The object of the action was to require the shipmaster to retain the goods that were saved until the amount due for contribution had been paid (D. 14, 2, 2, pr.); or if the goods had been delivered, to allow the losers to sue the owners of the goods saved in the shipmaster's name.

The shipmaster may either retain the goods saved until contribution has been made (D. 14, 2, 2, pr.), or he may sue the passengers and owners on the contract of hire (*actio ex locato*).

III.—PARTNERSHIP (*SOCIETAS*).

DEFINITION.

Partnership is a contract in which two or more persons combine their property, or one contributes property and another labour, with the object of sharing amongst themselves the gains. (D. 17, 2, 3, 3; C. 4, 37, 1.) A partnership cannot be constituted in which one partner contributes neither property nor labour. (D. 39, 6, 35, 5; D. 17, 2, 5, 2.) A partnership could exist in which one of the parties was to share in the profit, but not in the loss; but a partnership could not exist when one of the partners was to share in the loss only, and not in the profit (*Leonina Societas*). Such a contract could not be made except from a charitable motive; but in partnership it was necessary that there should be a valuable consideration moving from each of the partners. (D. 17, 2, 29, 2.)

Illustrations.

A farm adjoining the lands of Iucius Titius and of his neighbour Gaius Seius was for sale. Titius, desiring to have the part adjoining his land added to it, asked Seius to buy the land. Afterwards, Titius, without informing Seius of his purpose, went and bought the farm in his own name. Can Seius compel Titius to share the farm with him? In other words, are they partners? Ulpian said the question was one of fact, not of law. What did Seius and Titius intend? If the agreement was simply that Seius should buy the farm, and give Titius a part of it, there was no partnership. But if the intention was that the thing bought should belong to them jointly (*ut quasi commune negotium gereretur*), then Titius will be bound to give up to Seius the portion of the farm set apart for him by the agreement. (D. 17, 2, 52, pr.)

Flavius Victor and Bellicus Asianus made an agreement to this effect:—Land was to be bought with the money of Victor, on which Asianus by his labour was to raise buildings; upon the sale of these Victor was to get back the money with a certain sum in addition, and Asianus was to have the balance. This is a partnership. (D. 17, 2, 52, 7.)

Titius gives Seius a pearl to sell on condition that Seius should give Titius 10 *aurei* if he sold the pearl for that sum; and if he got more, should keep the excess for himself. If the intention was to form a partnership, Titius contributing the pearl and Seius labour, and 10 *aurei* was mentioned merely as a mode of determining the division of profits, it would be a partnership; but if Titius simply intended to trust Seius with his pearl on sale, and allowed the excess above 10 *aurei* as a reward for his trouble, it would be a valid contract, of the nature of an equitable contract, but not a partnership. The practical difference would be this:—If it were a partnership, Seius could compel Titius to deliver the pearl, if he had not done so, in order to give him an opportunity of selling it; or if Titius sold it, or gave it to another to sell, Seius would still be entitled to his profit; but if it was not a partnership, Seius had no rights against Titius until the pearl had actually been delivered to him. (D. 17, 2, 44.)

KINDS OF PARTNERSHIP.—In some respect the rules applicable to partnership differed according to the subject-matter of the contract.

The partnerships in which we usually join, either extend to the whole of our goods—this the Greeks call by the special name of *κοινωπραξία*—or apply to some one business only, as buying and selling slaves, oil, wine, or corn. (J. 3, 25, pr.; G. 3, 148.)

I. TRADE OR PROFESSIONAL PARTNERSHIP (*Societas universorum quae ex quaestu veniunt*).

This is the kind of partnership that is understood to be made, if no other form is specially agreed upon. (D. 17, 2, 7.) Sometimes it is called *societas quaestus et lucri* or *societas quaestus et compendii* (D. 17, 2, 13; D. 29, 2, 45, 2); but these additional terms, although they serve to explain the scope of the contract, add nothing to it. *Quaestus* is whatever is gained by the exercise of skill or labour. (D. 17, 2, 8.) A partnership of two bankers or money-lenders (*argentarii*) is an example of a trade partnership. (D. 17, 2, 52, 5.)

Neither partner is bound to contribute anything that does not come under the definition of commercial profit (*quaestus*). Each keeps to himself separately what he acquires by legacy, gift, or inheritance. (D. 17, 2, 9; D. 17, 2, 71, 1; D. 29, 2, 45, 2.) In like manner, the partners cannot demand from the partnership the payment of debts, except those incurred in the pursuit of the profit (*quaestus*), which it is the object of the partnership to share. (D. 17, 2, 12; D. 17, 2, 82.) Other expenditure might, however, be imposed on the partnership by special agreement.

Illustration.

Julius and Attius are partners. Julius has a daughter, Flavia, and it has been agreed that the dowries of the partners' daughters shall be paid out of the partnership property. Julius, on the marriage of Flavia, promised a dowry, but died before it was paid, leaving Flavia his heir. Flavia, being her father's heir, was now bound to pay to the husband the amount of the dowry. A divorce, however, took place, and Flavia was released by her husband from the obligation of paying the dowry.

Can she, as heir of her father, claim to rank as a creditor against the partnership funds in respect of her dowry? Papinian observed that the original agreement was valid if both the partners were to have a right to charge the dowries of their daughters against the partnership funds, even if one only of the partners had a daughter. In this case, if the dowry had been paid, Flavia could have recovered it from her husband, and would not have been obliged to give it back and share it with Attius, because she got the money back from her husband in her own right, and not as her father's heir. But as the money was not paid, and not demanded from the partnership funds before the death of Julius, and consequent termination of the partnership, Papinian decided that Flavia had no claim. He goes on to add that if the dowry had been paid by Julius, and his daughter had died leaving her husband surviving, Julius would have been bound to sue the husband for the dowry and restore it to the partnership funds. If, on the contrary, the wife had survived the marriage, Julius could take back the dowry only subject to an obligation to return it to Flavia if she re-married. If the

first husband's estate did not suffice to restore the dowry, a second dowry could not be charged against the partnership funds. (D. 17, 2, 81.)

II. PARTNERSHIP FOR A SINGLE TRANSACTION (*Societas negotiationis alicujus*).

The partnership may be limited, as stated by Justinian, to a single sale or other transaction, in which case only what is gained and expended in connection with it enters into the partnership. (D. 17, 2, 52, 5.)

Illustration.

Cornelius has three horses, and Licinius one; and they agree to sell them in a single team (*quadriga*), and divide the proceeds. Before the sale, the horse of Licinius died. Was Cornelius bound to pay three-fourths of the loss? This depends on the terms of the agreement. If the partnership was only for the *sale* of the team, then until the sale there was no interchange of ownership, and the loss falls wholly on Licinius. But if the agreement was that they would make a team of four, in which partnership Cornelius had three shares and Licinius one, and the horse of Licinius died, the loss must be divided between the partners, in proportion to their shares (D. 17, 2, 58, pr.)

III. A special case of this partnership was in the collection of taxes (*societas vectigalium*). It differed from the other instances of partnership in no respect, except one of the divestitive facts (see p. 351). It is generally ranked as a distinct kind of partnership.

IV. *Societas universorum bonorum*.—This is a partnership including all the property of the partners, in whatsoever manner required, and providing for the payment of all their expenses. (D. 17, 2, 1, 1.) It occurs where two persons agree to put all their money into a common purse, out of which all their expenses are to be paid.

As soon as the contract is made, the moveable and immoveable property of each of the partners becomes, without any mutual delivery, at once the joint property of all the partners. (D. 17, 2, 2.) Whatever is subsequently acquired by a partner does not become joint property until the partner gives it in the usual way to his copartners. (D. 17, 2, 74.)

What a partner acquires by legacy, inheritance, gift, or in any other manner, belongs to the partnership. (D. 17, 2, 3, 1; D. 17, 2, 73.) Thus, even the dowry that one of the partners receives with his wife must be shared with the partners, subject to the obligation of the husband to return it in certain events. (D. 17, 2, 65, 10; D. 17, 2, 65, 16; D. 17, 2, 66.)

The sums due (*nomina*) to each partner can be sued for only in

that partner's name, but each partner is bound to place his right of action at the disposal of his copartners. (D. 17, 2, 3.) The damages obtained by a partner for an injury (*injuria*) to his son must also be given up to the partnership. (D. 17, 2, 52, 16.)

On the other hand, all the lawful expenses of the partners must be paid out of the common fund; but not damages that they have to pay for wilful misconduct. (D. 17, 2, 73, 1; D. 17, 2, 52, 18.) Money lost in gambling cannot be charged to the common fund (D. 17, 2, 59, 1), unless the partners have shared in gains from the same source. (D. 17, 2, 55.)

V. JOINT OWNERSHIP (*Societas unius rei vel certarum rerum*). (D. 17, 2, 31.)

The subject of joint-ownership crops up in this place merely from a peculiarity of the forms of action. If the joint-ownership arose by some act or event other than the will of the co-owners, the proper remedy was the action *communi dividundo* or *familiae erciscundae*; but if the joint-ownership arose from the act of the co-owners, the *actio pro socio* could be brought (D. 17, 2, 34); and in no material respect was there any difference between them, unless perhaps that a partner cannot be compelled to pay beyond his means; whereas there was no such restriction in the other actions. Thus each partner could alienate his own share (C. 4, 52, 3), but not more than his own share. (D. 17, 2, 68.) A partner could not exercise any right of ownership (as building on the common land) against the wishes of the others. (D. 17, 2, 39; D. 8, 2, 27, 1; D. 8, 5, 11, pr.) For when two persons have equal rights, the one that forbids prevails (*in re enim pari potiore causam esse prohibentis constat*). (D. 8, 3, 28.)

Illustrations.

Pamphilus, a freedman, and his patron Titius, together buy land, and delivery is made to both. They are joint-owners. Pamphilus, however, paid all the price. He can compel Titius by the *actio pro socio* to pay the half. (C. 4, 37, 2.)

Two brothers, joint-heirs, agree to hold all that they get from the inheritance in common. This constitutes a partnership of the inheritance, but does not include what they acquire from other sources. (D. 17, 2, 52, 6.)

An agreement between Titius and Julius was made, that whichever acquired an inheritance should share it with the other. Titius afterwards became sole heir of his father. Thereupon a partnership of the inheritance arises. (D. 17, 2, 3, 2.)

Titius and Seius are copartners of Stichus. Titius leaves a legacy to Stichus of two *aurei*. Seius being the sole owner of Stichus becomes entitled to the legacy. Can the heir of Titius, as the heir of a partner, compel him to divide the legacy? No,

because Seius receives the legacy, not in his capacity as partner, but, by the operation of a rule of the civil law, in consequence of his being owner. But he is obliged to give the heir half of the value of Stichus. (D. 17, 2, 63, 9.)

RIGHTS AND DUTIES.

The rights and duties of partners may be considered under two heads—(1) the duties partners owe to each other; and (2) the duties they owe to outsiders in consequence of the acts or forbearances of one of themselves. The second case, in modern law, is of not less importance than the first. It is almost an essential element of the modern notion of copartnership that each partner is an agent for all the others within the scope of the partnership. But the implied agency of one partner for another did not enter into the Roman notion of copartnery. We have, then, to consider here only the duties of partners towards one another; how far each partner could represent the others in legal transactions will be considered in connection with the law of Agency.

1. Each must contribute to the common fund what has been agreed upon, and also whatever each gets in respect of the partnership. Hence, if one partner recovers more from a debtor than the others, he must share his good-luck with his co-partners. (D. 17, 2, 63, 5.)

2. Each partner is entitled to be reimbursed all expenses properly incurred (D. 17, 2, 52, 12), and to be indemnified in respect of all the duties to which he subjects himself on behalf of the partnership. (D. 17, 2, 27; D. 17, 2, 28; D. 17, 2, 38.) If one of the partners becomes insolvent, and is unable to pay his share, the other partners must, in proportion to their shares, make good the deficiency. (D. 17, 2, 67, pr.)

Illustrations.

A partner, travelling for his firm to buy merchandise, is entitled to travelling expenses, and the cost of conveying himself, his baggage and merchandise. (D. 17, 2, 52, 15.)

A partner, in resisting the flight of slaves belonging to the partnership, is wounded. Can he recover the cost of medical attendance for his cure? Labeo held that he could not, and drew a subtle distinction between expense incurred on behalf of the partnership and expense incurred incidentally in consequence of being a partner. It is like the case where a legacy is left to a man in consequence of being a partner. He is not obliged to contribute that. (D. 17, 2, 60, 1.) This subtlety was rejected by Julian, whose opinion had the further sanction of Ulpian, and is endorsed in the Digest. (D. 17, 2, 61.)

Titius and Seius agreed to deal together in mantles, and Titius set out on a journey to buy stock. On his way he was met by robbers, who stole the money he took to pay

for the merchandise, wounded his slaves, and stripped him of his own private property. Julian held that not merely must the loss of the partnership money be borne equally by the two, but that Titius must pay half the loss of the private property of Seius, and of the other damage, including medical expenses. (D. 17, 2, 52, 4.)

3. Whether one partner is liable to another simply as such (by the *actio pro socio*) in case of wilful wrong, as is a man that has suffered anything to be deposited with him, or whether he is not also liable for a fault on the score of sloth, that is, and negligence is questioned. The opinion has, however, prevailed that he is liable even for a fault. But everything that falls short of the utmost possible diligence is not therefore a fault. For it is enough that a partner display such diligence in regard to the common affairs, as he usually does in regard to his own. And the man that has taken to himself a partner lacking in diligence has only himself to complain of; he must ascribe his loss, in fact, to his own want of forethought. (J. 3, 25, 9.)

Illustration.

A partnership is made between Sempronius and Titius, Titius undertaking to pasture the cattle of Sempronius, and share the profits with him. The cattle are taken over by Titius at a valuation. Some of the cattle are carried off by robbers, and the rest stolen. In this case Titius must pay the value of the stolen cattle, but the loss of the cattle taken by robbers falls on Sempronius. The reason is, that with due care Titius could have prevented the theft, but he could not withstand robbery. (D. 17, 2, 52, 3.)

A partner employed his slave to work for the partnership; the slave by his negligence did some damage. The partner could not set off against this damage any special benefit acquired through that slave. (D. 17, 2, 23, 1; D. 17, 2, 25.)

And the general rule was that a partner could not set off what he gained by unusual industry against losses incurred by negligence. (D. 17, 2, 26.)

INVESTITIVE FACTS.

Partnership was formed by the simple consent of the parties. (D. 17, 2, 4.) It seems at one time to have been a moot point whether a partnership could be made subject to a condition, but this was decided in the affirmative by Justinian. (C. 4, 37, 6; D. 17, 2, 1, pr.)

If no express agreement has been come to as regards the shares of profit or loss, equal shares in both cases are contemplated. But if the shares have been expressed, then they must be kept to. (J. 3, 25, 1; G. 3, 150.)

It is easily seen that if the share is expressed in one case only, whether of profit or loss, but omitted in the other, then in the other case also that has been passed over the same share must be kept to. (J. 3, 25, 3; G. 3, 150.)

As in the case of sale and letting, the determination of the shares might be left to a third party (*arbiter*). (D. 17, 2, 76.) If no decision were given, the contract came to nothing. (D. 17, 2, 75.) If the decision were manifestly unfair, it would be set aside. (D. 17, 2, 79.) But the mere fact of the arbiter giving more to one than another was not evidence of unfairness, because one might contribute a larger share of capital, industry, or credit. (D. 17, 2, 80.)

It never was doubtful that, if two persons come to an agreement between themselves that two-thirds both of profit and of loss shall belong to one and one-third to the other, such an agreement holds good. (J. 3, 25, 1.)

But certainly the following agreement has been much disputed.

If Titius and Seius agree between themselves that two-thirds of the profit shall belong to Titius and one-third of the loss, two-thirds of the loss to Seius and one-third of the profit, ought such an agreement to be regarded as valid? Quintus Mucius thought that such an agreement was contrary to the very nature of a partnership, and therefore ought not to be regarded as valid. Servius Sulpicius was of the contrary opinion, and his view has prevailed. For often there are some men whose services in a partnership are so valuable, that it is just that they should be admitted into it on better terms than the others. In support of this, it may be added, that no one doubts men can join in a partnership on these terms,—that one shall bring in all the capital, the other none, and yet that the profit shall be shared in common; for often a man's services are an equivalent for capital. So fully has the opinion opposed to that of Quintus Mucius been established, that it is even accepted that partners may agree that one shall share the profit without being liable for loss, as Servius consistently thought. But such an agreement ought to be understood to mean, that if one part of the business brings in a profit, and another a loss, then a balance must be struck, and only the excess of profit over loss be regarded as profit. (J. 3, 25, 2; G. 3, 149.)

TRANSVESTITIVE FACTS.—No partner could give away his share, so as to put another in his place. (D. 17, 2, 19.) The rule is thus expressed: the partner of my partner is not my partner (*Socii mei socius meus socius non est*). (D. 50, 17, 47, 1.)

SPECIAL DIVESTITIVE FACTS.

1. A partnership lasts as long as the partners continue their consent; but if one renounces the partnership, it is dissolved. Clearly, however, if a partner craftily renounces the partnership in order to be alone in having some profit that is falling in—if, for instance, a member of a partnership that extends to all the goods of the partners is left heir to some one, and thereupon renounces the partnership in order to be alone in profiting by the inheritance—he is compelled to share the profits. But any other profit he makes, without hunting after it, belongs to himself alone; while all that is acquired in any way after the partnership is renounced, is given up to the renounced partner, and to him alone. (J. 3, 25, 4; G. 3, 151.)

The power of withdrawal exists only when the duration of the partnership has not been fixed. If a time has been agreed upon, a partner that withdraws divests himself of all rights in respect of the partnership, but remains liable for all obligations. (*Socium a se, non se a socio liberat.*) (D. 17, 2, 65, 6.) Even if no time is fixed, a partner cannot withdraw when it is inconvenient for the partnership; as, for example, force a sale of slaves at a disadvantage. (D. 17, 2, 65, 5.)

An agreement that a partner should not be at liberty to withdraw was void. (D. 17, 2, 14.)

2. By Action. If one of the partners goes into court to

secure his rights, it is understood that the partnership is thereby wound up. (D. 17, 2, 65.)

3. A partnership is dissolved, too, by the death of a partner ; because, in entering into a contract of partnership, a man* chose for himself a determinate person. Even if the partnership was formed by more than two persons consenting to join, the death of one dissolves it although several survive, unless it was otherwise agreed when they joined in partnership. (J. 3, 25, 5 ; G. 3, 152.)

The *Societas vectigalium* is an exception to this rule. In this partnership the heir of a partner may by, but not without, a special agreement, succeed as a partner. (D. 17, 2, 59 ; D. 17, 2, 35.)

If one of the partners acts on the assumption that a partner is alive, who in point of fact is dead, the partnership is regarded as existing. This beneficial rule existed also in mandate. (D. 17, 2, 65, 10.)

4. Therefore it is agreed that *capitis deminutio*, too, dissolves a partnership ; for, on the principle of the *jus civile*, this is regarded as almost equivalent to death. But if the members agree to go on still as partners, a new partnership is held to begin. (G. 3, 153.)

This is true only of the greater and middle change of status, not of the smallest (*minima capitis deminutio*). Hence the arrogation or emancipation of a partner did not dissolve the partnership. (D. 17, 2, 58, 2 ; D. 17, 2, 65, 11.)

5. Again, if one of the partners has his goods sold off, either by the State or by private creditors, the partnership is dissolved. But in this case a new contract of partnership may be entered into ; for such a contract needs only bare consent, and comes under the *Jus Gentium* ; and all men, by natural reason, can give consent. (G. 3, 154.)

Confiscation of goods, too, plainly breaks up a partnership, if, that is, the whole goods of the partner are confiscated ; for since another comes into his place, he is regarded as dead. (J. 3, 25, 7.)

Again, if one of the partners, weighed down by heavy debts, yields up his goods, and has all his substance sold for debts, public or private, the partnership is dissolved. But in this case, if the members agree to go on still as partners, a new partnership is begun. (J. 3, 25, 8.)

6. Again, if a contract of partnership is made for some special business, when that is ended the partnership is at an end. (J. 3, 25, 6.)

7. The loss of the partnership property also terminates the partnership. (D. 17, 2, 63, 10.)

8. By the lapse of the time for which the partnership was constituted. (D. 17, 2, 65, 6.)

REMEDIES.

I. *Actio pro Socio.*

1. This action is brought to enforce the rights *in personam* of the partners ; if a division of the property is desired, recourse must be had to the *actio communi dividundo*. It is, therefore, confined to the accounts between partners. (D. 17, 2, 43.)

2. If any obligations are outstanding, and cannot be settled on the dissolution of the partnership, security must be given to the burdened partner. (D. 17, 2, 27 ; D. 17, 2, 38.)

3. Partners have a special benefit as between themselves ; they cannot be made to pay more than they can afford, or have deprived themselves of the means of paying (*in id quod facere possunt, quodve dolo malo fecerint quominus possent, condemnari oportere*). (D. 17, 2, 63 pr.)

A partner, however, who denies the existence of a partnership, does not enjoy this benefit. (D. 42, 1, 22, 1 ; D. 17, 2, 67, 3.)

If a man brings an action against his parent or *patronus*, or if a partner brings an action against a partner in a suit arising out of the partnership, the plaintiff cannot gain more than his opponent can pay. And it is the same when a man is sued for what he has given as a present. (J. 4, 6, 38.)

2. The *actio communi dividundo* co-exists with the *Actio pro socio*.

3. The *actio legis Aquiliae*, *actio furti*, and others, may also, according to circumstances, be invoked by an injured partner. (D. 17, 2, 47, 1 ; D. 17, 2, 49 ; D. 17, 2, 50 ; D. 17, 2, 45 ; D. 17, 2, 46 ; D. 17, 2, 51 pr. ; D. 17, 2, 51, 1.)

Fourth, HISTORY AND CLASSIFICATION OF ROMAN CONTRACTS.

Having enumerated and described the Roman Contracts as they are given in the Institutes of Gaius and Justinian, we may pause before proceeding to complete an outline of the subject from the *corpus juris*, to examine the principles upon which the Roman contracts are based, and the order of their development. These two topics—the history and juridical principles of contract—are, at least for the student of Roman Law, inseparably bound up together. The history of contract affords the best justification of the arrangement that has been set forth, and a careful analysis of the principles upon which the Roman Law extended legal protection to contracts sometimes furnishes a clue to their history.

I.—FORMAL CONTRACTS.

The formal contracts of the Roman Law, as already described, are three in number : they are all said to descend from the *jus civile* ; and they rest upon a simple principle. The obligatory force of these contracts depends on the exact observance of their respective forms.

The juridical principle of the formal contracts is obvious, and requires no commentary, but the question of their origin is very obscure. According to the opinion of some high authorities, the three formal contracts—*Nexum*, *Stipulatio*, *Expensilatio*—are not equally ancient. The *Nexum* is said to be the parent-contract from which not only the *Stipulatio* and

Expensilatio, but all the other contracts of the Roman Law are lineally descended.

The writer has been driven to the conclusion that this hypothesis, although very attractive, is not supported by the evidence; and that we must still look upon the stipulation as primordial, as it is one of the most ancient contracts of the Roman Law. (See Note at the end of this section.)

1. Anciently in Rome betrothals were made by stipulation (hence the terms *sponsus*, *sponsa*, from *spondeo*). (D. 23, 1, 2.) In the classical period, the stipulation was not employed, and no action lay for breach of promise. We learn from Servius Sulpicius, a jurist who died about B.C. 42, that betrothal was an institution of the Latin people, who kept up the action for breach of promise (*actio ex sponsu*) until they were incorporated with the Romans. There can be no question of the antiquity of the custom. It was, in fact, one that could not fail to arise as soon as men gave up the practice of stealing wives, and sought them by purchase. A preliminary bargain was necessary to settle the price, and the conclusion of that bargain prior to the ceremony of marriage was betrothal. One of the forms of Roman marriage, in olden times, was a mancipation of the wife to the husband (*coemptio in manum*). Now it would have been impossible that the previous contract should have been made by a mancipation, even fictitiously, because if the woman had really been mancipated, even for the sake of form, to an intending husband, she would at once have been subjected to his *manus* beyond recall. (G. 1, 115 B.) Hence, in betrothal, an extremely ancient institution, we find the opposition between contract and conveyance, between promise and property. This distinction, if Sulpicius is right, corresponded with that between *stipulatio* and *mancipatio*.

2. It is impossible to avoid being struck by the prominence given to the stipulation in the Roman law of procedure. Not only was it largely employed by the Praetor, but in its oldest form as a *sponsio* it figured in the ancient *condictio* (the *legis actio* of that name. See Book IV., Proceedings *in jure*. *Legis Actiones*). The ancient form of suretyship, called *vadimonium*, appears also to have been made by *sponsio*.

It is easy to understand why the stipulation should have been so extensively employed in civil procedure. The obligations enforced in connection with civil proceedings took the form of requiring a person to do or not to do something. Now

we can hardly suppose such contracts ever to have been made by *nexum*. The *nexum* was germane to contracts related to the transfer of property, but it seems quite irrelevant to contracts concerned with personal acts and forbearances. But such contracts fell naturally under the domain of the stipulation.

There is nothing in Roman Law to throw light on one of the characteristics of the stipulation; namely, the form of question and answer. It is a unique form. But the other essential feature of the stipulation anciently—the word *spondeo*—has some interesting affinities.

The cognate term in Greek—*σπονδή*—is a sacrifice by libation of wine, oil, honey, or water. It is also the name for a simple treaty of peace as distinguished from a treaty of alliance. This ought to be taken along with a statement of Gaius (G. 3, 94), who says that in one case only could *spondeo* be used by an alien; namely, in making peace with the Roman people. It may perhaps be inferred that the word *spondeo* carried a sanctity with it beyond the confines of Rome. It would appear that *sponsiones* were current among the Greek and Latin tribes as a most binding and sacred kind of promise.

The third formal contract is *Expensilatio*. Ortolan contends at great length, and with much vigour, that this contract is derived from the *Nexum*. He summons to his aid the well-known terms in which entries were made in the domestic ledger, *expensa lata*—terms that seem to imply originally a weighing out of the money.

The *Expensilatio* was rarely, if ever, used as a means of creating rights in *personam*; it was used as a mode of novation, insomuch that if the text of Gaius were all the information we had, we should be bound to omit *Expensilatio* from the list of contracts, and introduce it under the head of Transvestitive Facts. The juridical principle of the contract is obvious. According to all testimony, the accounts of a Roman household were kept with extreme exactness, and all sums due to or by the head of the house, when ascertained, were duly entered. In case of dispute, these books formed the best evidence: if the books of the creditor and debtor agreed, the dispute was at an end; if the books of the creditor only had the entry, the question was whether the entry was made with the consent of the debtor. If it was, there could be little hesitation as to the judgment that ought to be given. From the extreme care and scrupulous honesty with which the family accounts were kept,

they naturally attained a high degree of value as evidence; and there seems no difficulty in believing that at length the debtor was not allowed to go behind the entry on the ledger, if it were made with his consent, to dispute his obligation. The literal contract is, in short, merely an example of the doctrine of *estoppel*. A man that had consented to his name being entered as debtor for a given sum in the books of another, was not permitted to deny that the money was really due. From the writings of Cicero we learn that one that entered what was not due to him, and one that did not enter as due what he really owed, were alike guilty of nefarious misconduct.

There is no reason for limiting the effect of the literal contract to debts arising from *nexum*: it was equally applicable to debts arising from stipulation, or in any other way. Nor is any real light thrown upon the *expensilatio* by connecting it with the *nexum*. The words *expensa lata*, for aught that appears to the contrary, may have been employed in as figurative a sense when the doctrine of *estoppel* was first applied to written entries in the household ledger, as the word "expenditure" is at the present day.

II.—EQUITABLE CONTRACTS.

1. *Depositum, Pignus, Mutuum, Commodatum.*

Of the contracts *re* enumerated by Gaius and Justinian, two, but two only, can with absolute confidence be regarded as derived from the *nexum*. These two are *pignus* and *depositum*. It is a curious circumstance, if it be merely accidental, that both Gaius (G. 2, 65) and Boethius mention two only, and these the same examples; namely, *pignus* and *depositum*. There appears to be no testimony in favour of a similar derivation of *mutuum*, a contract that presents strong affinities with the two undoubted derivatives of the *nexum*; and yet there seems no reason why such testimony should be wanting, if, indeed, the *mutuum* had ever been made *per aes et libram*.

When we seek, in the absence of positive testimony, to determine the precise character and limits of the *nexum*, especially with a view to the claim advanced for it as the parent form of all contracts, it is of the utmost importance to possess two unquestionable instances of derivative contracts. By examining the characteristics of the progeny, we may be able to determine something of the nature of the parent, and to specify what we should expect to find in other members of the family. The

relation of the *pignus* to the *nexum* has been already described. A few words may now be added in respect of the *depositum*. Boethius (Cic. Top. 4, 10, 41), explaining the term *fiducia*, says it occurs when a thing is given by *mancipatio* or *cessio in jure* to another, on condition that upon the happening of certain events it should be conveyed back to the owner. This happens when a man, afraid of civil broils, mancipates his land to a more powerful friend, who promises to restore the land when the danger has passed away. From this it would appear that the contract of *fiducia* was of the nature of a condition or engagement annexed to the conveyance of property.¹

The transaction *per aes et libram* always admitted a considerable degree of elasticity in the language employed in what we may call the "operative part" of the proceeding. The presence of the balance-holder and the bronze was indeed constant, but the *nuncupatio*, the words that determined the legal character of the ceremony, varied. Gaius gives several examples; as in the conveyance of a slave (G. 1, 119), and in the making of a will. (G. 2, 104.) But in these cases, although the language varies, it is within narrow limits. The words define the legal effect of the ceremony, and nothing more. But the cases of deposit and mortgage carry us further. The words employed do not simply qualify the act of conveyance; they impose on the person receiving the property an obligation to return the property on a future day named, or on the happening of some event. These cases, then, furnish an example of the perversion, so to speak, of the form of conveyance to the purpose of contract. But the perversion is within the very narrowest limits. The words creating a conditional obligation to return the property are closely connected with the conveyance; and without any great stretch may be held to be covered by the ceremony, and so to be clothed with a legal sanction. The slightness of this perversion is made apparent when we consider that it would have required a distinct step in advance to have got so far as the *mutuum*. In that case the obligation was to return, not the

¹ An instance probably of the same kind is narrated by Varro (de r. r. 7, 105) as the opinion of Mamilius. "A freeman that gives his services, as in slavery, on account of the money that he owes, is, until he discharges the debt, called *nexus*." (*Liber qui suas operas in servitute (in) pro pecunia quam debebat (dat) dum solveret, nexus vocatur, ut ab aere obaeratus.*) This is supposed to refer to an actual *mancipatio* of the debtor himself, on condition that when the debt is paid his creditor shall release him.

things actually lent, but the same quantity and quality. This fact should be kept in mind, because while we know that deposit was at first made *per aes et libram*, we have no evidence that *mutuum* ever was.

The *contractus fiduciæ*, or engagement annexed to a conveyance *per aes et libram*, presents some features deserving of remark. It was not introduced by the Prætor, for the fiduciary deposit is at least as old as the XII Tables; nevertheless it was a contract in which good faith was required. Again, a person that broke an engagement of this sort was punished with the civil and political disabilities of infamy. This appears strange, since it was not until nearly the end of the Republic that a *stipulatio* could be upset by the plea of fraud. (See Sub-Div. II., Fraud in Contract.) But it seems to have been considered that the greater the confidence reposed, the more shameful was a breach of faith, and thus infamy might attach to a simple breach of contract. The reason why infamy was fixed to a delinquent depositor or mortgagee is manifest. The owner divested himself of his ownership; he gave up his right *in rem* against all the world, and accepted instead a right *in personam* against the person to whom he conveyed his property. The infliction of infamy was an attempt to strengthen what Bentham calls the social sanction in consequence of the weakness of the legal sanction. Under the head of Mortgage an account has been given of the manner in which the Prætor dexterously superseded the clumsy and inconvenient mortgage of the *jus civile*. His action in the case of deposit was similar. He gave effect to a deposit made without the ceremony *per aes et libram*, deprived the depositor of his right *in rem*, and thus disabled him from alienating the property. Having thus given complete security to the owner, who now, in spite of the deposit, continued to have all the rights and remedies of an owner, the Prætor was at liberty to remove the penal action to which a depositor was exposed. Except, therefore, when the deposit was made under stress of shipwreck, fire, or the like, a depositor was not liable to pay double the value of the thing in the event of his being condemned for breach of contract.

There appears to be no evidence to connect the contract of *mutuum* with *nexum*, but it would seem to have been ranked in the Prætor's Edicts along with *commodatum* and *pignus*. (D. 12, 1, 1, 1; D. 12, 1, 2, 3; Ulp. Frag. Inst. 3, 1.) *Commodatum*, in the

form we know it, was of Praetorian origin. (D. 13, 6, 1.) These two contracts naturally go together. *Mutuum* is the loan of things that are consumed in the use; *commodatum* is the loan of things that are not consumed in the use. In *mutuum* the borrower necessarily becomes owner of the things lent, and is bound to return simply the same quantity and quality: in *commodatum* the borrower acquires no right *in rem* to the thing, and must return the identical article he has borrowed. In regard to both contracts, the evidence, although not conclusive, tends to show that the Praetorian contract was a substitute, not for the *nexum*, but for the *stipulatio*. Thus, although in the absence of a *stipulatio* the Praetor compelled a borrower to return the money, wine, corn, or whatever else he borrowed, he did not require him to pay interest. For *that* there must be a distinct and special stipulation. The utmost extent to which the Praetor relaxed this rule, was to permit—and that only in a few cases—interest to be attached to the loan by mere oral or written agreement (*pactum*) without the interrogative form (*stipulatio*). If we suppose that, prior to the intervention of the Praetor, a borrower could not be forced to return what he borrowed unless he had bound himself by *stipulatio*, we may take it that loans were seldom made without *stipulatio*, and that the promise of the *stipulatio* included both principal and interest. If, however, a lender neglected that precaution, upon what ground could he ask the assistance of the Praetor? The Praetor could not be asked to give effect to an informal promise as such, but he might go so far as to require the borrower to return the principal, for the borrower was taking advantage of the forms of the *jus civile* to cheat the lender of his money. Equity required so much, but it required nothing more. Interest was always regarded in the Roman Law as arising exclusively from contract; it did not bear the same relation to money lent that the rent of a farm did to the ownership of the farm. (D. 50, 16, 121.) Since, therefore, equity did not demand that the borrower should pay interest, and there was no *stipulatio*, the Praetor limited his interference to the return of the principal borrowed.

Commodatum was introduced by the Praetor, whether as a new form of contract invented by him or not, it would be rash to say. It occupies a peculiar position; on the one side of it is *usus* or *ususfructus*, gratuitous like *commodatum*, but belonging to the class of rights *in rem*; on the other side is *locatio-conductio*, belonging, like *commodatum*, to the class of rights *in personam*,

but not gratuitous. There is again a contrast with *mutuum*. Interest is a valuable consideration for a loan, and the contract of *mutuum* might be either with or without interest. *Commodatum* exists only when there is no valuable consideration, and when there is no right *in rem*. These peculiarities would be explained if we were to suppose that there was a time when a thing was not given for temporary use without exacting a stipulation for its return. If the owner gave up his property to be enjoyed by another without a stipulation for its return, had he any remedy against the borrower? If the interest of the borrower was *usus*, and the term of enjoyment had expired, undoubtedly the owner could recover his property. But if there was no *usus*, the only analogous limited right known to the law, apparently there was no alternative but to assume that the borrower's interest was unlimited, and that in fact the transfer of possession had made him owner. If that were so, there was an imperious necessity for the intervention of the Praetor.

Of the four contracts *re* mentioned in the Institutes, two certainly, *pignus* and *depositum*, and two probably, *mutuum* and *commodatum*, were derived from formal contracts. The author of the change was the Praetor. The object of the change was to prevent the forms of the civil law being used as means to defraud a person of his property. Suppose a deposit is made without the ceremony *per aes et libram*, and the depositee refuses to return the property, what remedy had the owner? He could not sue on the *contractus fiduciae*, for there was no such contract; could he sue as owner by the *vindicatio*? The probability is that he could not, because he had of his own volition parted with his property, trusting to the honour of his friend. At all events there was an injustice in driving the owner to the *vindicatio*, because as the depositee was in possession, the owner was required to prove his title. However that may be, we may rest assured that the Praetor would not have introduced the *actio depositi* if the owner had had any other suitable remedy. The principle he adopted was that it would be unjust to allow an owner to be deprived of his property merely because of his neglect to use a legal ceremony.

The main object of the Praetor's interference, therefore, was restitution. He interfered not to give effect to an informal promise, but rather to redress a wrong; not so much to compel the depositee to fulfil his promise, as to make him give back to

the owner the property of which he was unjustly deprived. It is this circumstance that gives to the so-called real contracts their peculiarities. The remedy of the Praetor is given to the owner to recover his property; unless, therefore, he has parted with his property, he has no occasion for the remedy. Hence there can be no contract *re* except by delivery of property by an owner. Suppose Titius promises to lend Gaius 10 *aurei*, but fails to keep his promise; Gaius cannot compel him to lend the money, if no stipulation has been made. If, however, Titius does advance the money, then the Praetor gives him an action for the recovery of it.

The Praetor went further in the case of the other three contracts *re*, and gave an action to the depositee or borrower (*commodatarius*) or mortgagee. This action was called *contraria*, and the word is significant. Suppose Maevius agreed to lend Sempronius his slave for a week, and sent the slave according to his promise. It would be unfair to Sempronius to demand back the slave before the week had expired, or to refuse to pay any extraordinary expense that the borrower was put to by the slave. The Praetor, then, acting on the principle that he that seeks equity must do equity, refused an action to the owner until the time had expired, and he gave compensation to the borrower.

2. Innominate contracts *re*.

It was long before the principle of the contracts *re*, although obviously capable of a much wider application, was distinctly perceived and consistently applied. At first the Praetor attempted merely to supply a remedy for certain cases of flagrant injustice with the smallest possible interference with the rules of the *jus civile*. But new cases occurred involving substantially the same grievance, and calling for an application of the same remedy. A single instance may be taken as a type of many. Gaius lends his ox to Titius for a fortnight to make up a ploughing team, and Titius agrees at the end of the fortnight to return the ox, together with one of his own, to be lent to Gaius for a similar period. After Titius has had the use of Gaius' ox, he refuses to perform his promise, and Gaius is put to the expense of hiring another ox to do his ploughing. The injustice that Gaius suffers is manifest, and is of precisely the same character as that of a lender when the borrower refuses to repay the loan. But the contract does not fall within the definition of *mutuum*; nor is it *commodatum*.

(because it is not gratuitous); nor is it *locatio conductio*, because the consideration is not in money. Had Gaius then no remedy?

In seeking for a suitable remedy for cases like that stated, the juriconsults naturally turned first to the action for fraud (*actio de dolo*). The conduct of Titius, if he had the means of performing his contract and refused, was certainly unjust, but it could hardly be called fraud. If, indeed, he had intended from the first to cheat Gaius, and used the promise only as a means to get the use of his ox, his conduct was fraudulent. But this could rarely be proved even when it was the fact, and the *actio de dolo* could not often be relied upon. The true remedy was to apply the equitable principle of the contracts *re*, and at length, after long controversy (for even Paul (D. 19, 5, 5, 3) and Diocletian (C. 2, 21, 4) except one class of cases), this course was adopted.

A remedy called *actio in factum praescriptis verbis* was given whenever, in a bilateral engagement, one of the parties had executed his promise, and the other refused to execute his promise. (D. 19, 5, 3; D. 19, 5, 11.)

3. *Mandatum*.

Mandate is placed in the Institutes in the class of contracts arising from consent (*ex consensu*). The circumstance that mandate alone of the consensual contracts presents an *actio contraria*, excites a suspicion that it is not in its right place, and that it should rather go along with the contracts *re*. If mandate were a true consensual contract, then it ought, from the moment that consent is given, absolutely to bind both parties. But, as already pointed out, mandate has not these characters. In the first place, the rights of the *mandatarius* do not arise from the consent of the *mandator* simply; they flow from his performance of the mandate. His rights rest, therefore, upon equity rather than upon consent. In the second place, the rights of the *mandator* do not arise from the simple promise of the *mandatarius*. That is the case when the agent is paid. But where the agent is not paid, the principal has an action against him only when he has suffered injury by trusting to his promise, and thereby forbearing to take the steps he would otherwise have taken to protect his interests. It is true that the claim of the *mandator* does not rest upon *acts* (as is the case in all other contracts *re*), but upon a *forbearance*. But in equity there is little difference

between saying, "I have done something at your request, in order that you may do something to me," and "I have abstained from doing something at your request, because you have undertaken to do it for me."

It is easier to assign mandate to its true place among contracts than to determine its origin. Is mandate an ancient, independent contract, or is it derived, and if so, from what other form, *nexum* or *stipulatio*? Some facts point in the direction of *stipulatio* as the parent-form; but the evidence is not so decisive as could be wished.

A contract in respect of the use of a thing or the services of a person might be made with or without valuable consideration; and if with valuable consideration, either in money or not. A contract for the use of a thing without consideration was *commodatum*; a contract for a personal service without consideration was *mandatum*: a contract for the use of a thing, or a personal service with a consideration in money, was *locatio conductio*: a contract for the use of a thing, or a personal service with a consideration, but not in money, was an innominate contract *re*, and was enforced by the *actio in factum praescriptis verbis*. *Commodatum* and *mandatum* thus naturally go together. They stand in the same relation to *locatio-conductio*; and probably they originated in the same way. The actions of *commodatum* or *mandatum* could never be employed unless when there was an absence both of a stipulation and of a pecuniary consideration. Occasionally this view is taken by the jurists. Thus in stating a case for mandate where there was no valuable consideration, Scaevola is at pains to add, "and there was no stipulation." (D. 17, 1, 62, pr.) Thus the equitable contract of *mandatum*, like the equitable contract of *commodatum*, may have been introduced where the parties had neglected to employ the *stipulatio*. There is much in the general character of the development of Roman contracts to support the view here suggested, but it cannot be taken as proved.

III.—CONTRACTS FOR VALUABLE CONSIDERATION.

In all the so-called consensual contracts (except *mandatum*), a pecuniary, or at least a valuable, consideration was essential.

1. SALE.—The contract of sale, as it was interpreted during the Empire, contained three main points:—(1) The duty of the seller was simply to deliver, not to make a good title; (2)

he was bound to warrant against eviction; and (3) against faults in the thing sold. But the evidence is conclusive that these obligations were at first made by stipulation, and that they became part of the law of sale only through the edict of the Curule Aedile. The effect of the Aedilitian Edicts was partly to impose on sellers a duty to disclose faults, and partly to enable warranties to be given without stipulation. A mere verbal warranty was to have the effect of a stipulation. The executory contract of sale was thus built up partly by admitting pacts for stipulations—i.e., informal for formal verbal promises; and partly by imposing as a legal duty that which previously could arise only from express stipulation.

The account given by Sir Henry Maine traces the executory contract of sale up to the *nexum*. If there were no positive evidence of the manner in which that contract was developed in the Roman Law, there would be some plausibility in ascribing the origin of the contract of sale to a process by which property was actually conveyed for a price. But there can be no question that the duties of the seller, in the mature law, arose from dropping stipulations, not from lopping off the ceremonial part of the *mancipatio*. It was the *stipulatio*, not the *nexum*, that was the parent-form of the executory contract of sale. There is an analogy between the executory contract of sale and betrothal—the executory contract of marriage. Betrothal was in the most ancient times made by *stipulatio*, while the marriage itself was effected *per aes et libram*.

2. HIRE (*Locatio-conductio*).—There is little to show any connection between hire and stipulation such as undoubtedly subsisted between sale and stipulation. But a case mentioned by Paul shows that the contract of hire was sometimes made by stipulation.

It was agreed between Titius, the landlord of a farm, and Seius his tenant, that during the period of his agreement Seius should not be expelled from the farm under a penalty of 10 *aurei*, to be paid by Titius; in like manner, if Seius departed before the end of his term, he was to pay the same penalty: the bargain was confirmed by reciprocal stipulations. (D. 19, 2, 54, 1.)

3. PARTNERSHIP (*Societas*).—There appears to be no evidence to connect partnership with either *nexum* or *stipulatio*, as indeed from the nature of the contract could scarcely be expected.

In these three cases the principle of valuable consideration is found. In a subsequent place, some other instances will be cited of contracts based on valuable consideration, but these

are few in number. The Roman Law never attained the point of generalising the principle of valuable consideration. That was the reason, probably, even more than the mistake with regard to *mandatum*, that induced the jurists to describe certain contracts as founded on consent, whereas when they came to describe the contracts individually, they stated that the very essence of them was pecuniary consideration.

The three classes into which contracts have been divided may now be defined, from a new standpoint, as unilateral or bilateral, executed or executory.

A contract is unilateral when it consists wholly of promises by one person. It is bilateral when it consists of promises made by two persons, which promises are the consideration for each other. Again, there is a distinction between executed and executory contracts. If a unilateral contract is executed, there is an end of it. But a bilateral contract may be executed as respects the promise of one party, and be executory as regards the promise of the other. Such a contract may be said to be part executed. If neither party has performed his promise, the contract is executory.

1. The formal contracts are *unilateral* and *executory*. This is obviously true of the *stipulatio*; it was also true of the *expensilatio*. The *nexum* also was unilateral, for it imposed an obligation solely on the person receiving property by conveyance.

2. The equitable contracts are bilateral agreements, part executed. Before either party has executed his promise, there is an executory agreement, but one that cannot be enforced by law. As soon as one has performed his agreement, the other is subjected to a legal obligation in respect of his promises. The equitable contracts are thus not executory.

3. The only *bilateral executory* contracts of the Roman Law are (with one exception, *pactum donationis*, hereafter to be stated) based on valuable consideration.

DERIVATIVE THEORIES OF THE STIPULATION.

The following passage from "Ancient Law" gives a concise account of the view of those that maintain not merely that the stipulation was produced from the *nexum*, but that the *nexum* itself, as a contract, was an extension or perversion of the ancient conveyance *per aes et libram* :—

"There is some, but not very violent, conjecture in the following delineation of the process. Let us conceive a sale for ready money as the normal type of the *nexum*. The seller brought the property of which he intended to dispose—a slave, for example—the purchaser attended with the rough ingots of copper which served for money, and an indispensable assistant, the *libripens*, presented himself with a pair of scales. The slave, with certain fixed formalities, was handed over to the vendee—the copper was

weighed by the *libripens* and passed to the vendor. So long as the business lasted it was a *num*, and the parties were *nexi*; but the moment it was completed the *num* ended, and the vendor and purchaser ceased to bear the name derived from their momentary relation. But now, let us move a step onward in commercial history. Suppose the slave transferred, but the money not paid. In that case the *num* is finished so far as the seller is concerned, and when he has once handed over his property, he is no longer *nexus*; but, in regard to the purchaser, the *num* continues. The transaction, as to his part of it, is incomplete, and he is still considered to be *nexus*. It follows, therefore, that the same term described the conveyance by which the right of property was transmitted, and the personal obligation of the debtor for the unpaid purchase-money. We may still go forward, and picture to ourselves a proceeding wholly formal, in which *nothing* is handed over and *nothing* paid; we are brought at once to a transaction indicative of much higher commercial activity, an *executory Contract of Sale*."—*Ancient Law*, p. 320.

According to this statement, the *num* would be the earliest contract known to the Roman Law; the stipulation would probably be its first offshoot, while the *expensilatio* would be later. Does this represent the true genesis of the Roman contracts? The question is important, because the answer must affect all the other contracts of the Roman Law. The conclusion to which the present writer has been driven is that there is no sufficient evidence to connect the stipulation by way of descent with the *num*, but that such evidence as exists points rather to the stipulation as representing an element in law equally primordial with the notion of property itself. Considering the high authority in favour of the derivation of the stipulation, it is necessary to consider the arguments at some length.

The derivative theory has appeared in two principal forms, the first published by Savigny, the second by M. Ortolan, and in this country by Sir Henry Maine. Savigny considers the *stipulatio* to be derived from the *num*; but the *num* itself he regards as by no means the primary form of contract. The oldest contract in his view is the *mutuum*; the *num* was merely a fiction employed to bring other contracts within the scope of the remedy provided by law for the *mutuum*. The reasoning that led Savigny to this conclusion may be briefly stated. He observes that the object that first demands the attention of the legislator is the protection of property. To secure to every man the enjoyment of his own, is the first imperative duty of the lawgiver. To enforce promises is not so urgent; and accordingly Savigny thinks that legal remedies were provided for property at a time when the fulfilment of promises had no other guarantee than the good faith (*bona fides*) of the promiser. He thinks that the first application of actions to promises was in the case of loan—a case that illustrated in a striking manner the necessity for legal protection. He thus contrasts hiring with loan. I let a house to another person for a term, at the expiration of which he refuses both to deliver up the house and to pay the rent. Now I can recover my house without going upon the contract, simply as my property; I cannot, however, recover the rent, unless the contract is enforced by law. But suppose I give him a loan of money, thereby making him owner of the money lent. Here, in consequence of my trusting him more, I have no legal remedy at all, because the ownership of the money is changed. Surely, then, this is a case that loudly calls for the assistance of law; and accordingly it is at this point, Savigny believes, the law of Rome first gave protection to contracts. If the borrower were permitted to retain what he had borrowed, he would have enriched himself unjustly by defrauding the lender; and it was a principle of the old *jus civile* to give a *condictio* against every one that unjustly enriched himself at the expense of another. This he holds to have been the principle on which the *condictio* was founded, and the only principle at first recognised by the Roman Law. He considers that the fictitious sale (*num*) was resorted to in order to bring other contracts within the scope and remedy of loans. The *num* was in fact a fictitious loan, and in that capacity it obtained legal recognition. His difficulty becomes greater with the *stipulatio* and *expensilatio*, which in their

mature form had no special reference to loan. Nevertheless, Savigny believes that both the *stipulatio* and *expensilatio* had no other basis in law than as fictitious loans of money.

There is, however, another class of contracts not enforced by *condictio* (the remedy for *mutuum*, *stipulatio*, and *expensilatio*), but by *actiones bonae fidei*. Savigny holds that contracts resting solely upon good faith do not call so earnestly for protection from the law. The parties, he contends, did not even go before a judge (*iudex*) properly so called; they went before arbitrators (*arbitri*). If there was any dispute, as each professed to act in good faith, there could be no pretence for refusing to submit to the decision of an impartial person. The arbitrator, chosen in such a spirit, was not confined to the strict rules of law, but was at liberty to decide according to the dictates of natural honesty and fairness. Such, according to Savigny, is the import of the distinction between actions *stricti juris* and actions *bonae fidei*.

In support of his views, Savigny refers to what he considers the *probable* origin of the stipulation. In the first place, he remarks that the word itself bears testimony in his favour. The most ancient and approved derivation traces it to the same root as *stipendium*—namely, *stips*, signifying money; and he thinks the stipulation rested on the fiction of a loan of money. But apart from the danger of building a theory on a supposed derivation of a word, it is not certain that *stipulatio* was the original name of the contract. There is reason to suspect that the original name of the contract was *sponsio*. (D. 50, 16, 7.)

It is a necessary part of Savigny's theory that the stipulation did not come into existence for Roman citizens until the abolition of the *nexum* by the *Lex Poetelia* (B.C. 326, 324, or 313). Inasmuch as the *nexum* and *stipulatio*, according to his views, were both fictitious modes of accomplishing one end, there could have been no necessity for the stipulation so long as the *nexum* was in existence. Savigny says, indeed, that even before that time aliens living in Rome, who could not use the *nexum*, may have introduced the practice of dropping the fictitious sale and trusting to a solemn form of words. At all events, he thinks that after the *lex Poetelia*, all, both citizens and aliens, adopted the stipulation as the solemn form of authenticating contracts in place of the superseded *nexum*. Now, as will appear presently, there can be no question that the *stipulatio* existed long before the *lex Poetelia*; that it was in vigour at least as early as the XII Tables, and in all probability is of much greater antiquity. This completely disposes of Savigny's theory, even if it were relieved from other and insuperable objections.

Ortolan and Sir H. Maine accept so much of Savigny's views as relates to the derivative origin of the stipulation; but they look upon the *nexum* as being at first the only contract from which subsequently all the rest descended. The *nexum* admitted of analysis into two parts—the ceremony of the balance and bronze, and the oral or nuncupative part, specifying the object of the ceremony, and determining the nature of the obligation. By dropping the ceremonial part, Ortolan says, the oral or verbal contract of stipulation was obtained.

Sir H. Maine carries the derivative hypothesis to its extreme issue, and if his view could be supported, it would reduce very much the primitive elements of law. His general point of view may be thus stated. Nearly the whole civil law may be grouped round three ideas,—Property, Contract, and Testament. Property comes first; testament is derived from it. This is so far true that the Roman Will was derived from the solemn form of conveying property—namely, the *mancipatio*; but this must be taken subject to the qualification that a Will could be made in Rome independently of the *testamentum per aes et libram*. If now contract also could be shown to be derived from Property, then the three great departments would be reduced to one, and Property would rank as the only primitive element. The bond uniting the two ideas is the *nexum*, which was simply the name for a *mancipatio*, when that antique form was resorted to, not for the conveyance of property, but for sanctioning a con-

tract. It is an undoubted fact that the same form used in the conveyance of property and in making wills was also employed to give legal effect to some contracts. It is also a fact that certain contracts—such as *depositum* and *pignus*—were derived from the ancient *nexum*. But, on the other hand, the evidence, it is contended, falls completely short in regard to the most important contract of all—the stipulation.

Sir Henry Maine lays chief stress upon the analogy of the Roman Will. The argument may be thus stated. The Roman Will in its mature form was, although unquestionably derived from the *nexum*, unlike its parent in every important particular. In its final shape it was a secret document, revocable up to the death of the testator, until which event it had no force whatever. Now the instrument from which it was derived, was, in all these particulars, exactly the reverse. It was irrevocable, it was made in the presence of five witnesses, and it took effect at once. Surely, then, this transformation is as great as was required to evolve contracts out of the *nexum*. The force of the analogy is, however, weakened by the following considerations.

1. The things compared are not similar. There is no antecedent improbability in the derivation of testaments from conveyance. For what is a testament? In form, doubtless, in the Roman Law, it was the nomination of an heir, but in substance it tended to become in an increasing degree a means of providing for the posthumous distribution of property. Now, there is nothing unlikely in the derivation of the mode of conveying property after death from the mode of conveying it during life, and a testament was substantially a conveyance of property to survivors. But contract differs *toto coelo* from conveyance; it is at the opposite pole of juridical ideas. It is the standing contrast between *jus in rem* and *jus in personam*.

2. There is positive evidence in favour of the derivative character of the Roman Will; there is no evidence, so far as known to the writer, of the derivation of the stipulation from the *nexum*. We are told in the Digest not merely that the *mancipatio* gave birth to the form of the testament, but also by whom and by what authority the change was effected. No such evidence, neither from Cicero nor from Gaius, is forthcoming in the case of stipulation. The absence of testimony is not conclusive, but it falls short of conclusiveness only on the supposition that the change from *nexum* to stipulation was effected by an agency earlier than the Praetorian. Indeed, there can be no question that the change, if effected at all, was not made by the Praetor.

The force of this argument is increased when we remember the characteristics of those contracts that have undoubtedly arisen from the *nexum*. The difference between them and the stipulation is so marked as in itself almost to compel us to assign another origin to the stipulation. The *pignus* and *depositum* are equitable contracts; the stipulation is a formal contract: the equitable contracts were established by the Praetor; the stipulation is older than the Praetors: these contracts are but slight deviations from the conveyance of property; the stipulation may have acts and forbearances for its objects: the equitable contracts are all bilateral engagements, where one of the parties has performed his promise; the stipulation is a purely unilateral contract. The development of contracts *re* from *nexum* offers a much closer analogy to the case of stipulation than the genesis of the Roman Will from *mancipatio*, and it can hardly be said that the characteristics of the equitable contracts add probability to the theory of the derivation of the stipulation from the *nexum*.

3. What M. Ortolan asks us to believe is that at some time or other, through some agency or other, the *nexum* was divested of all the dramatic and solemn part—the fictitious sale *per aes et libram*—and that an equal legal sanction was given to the bare words, being the informal part of the transaction. You have but to leave out the ceremony, the five witnesses, the balance-holder, the symbolic transfer of the bronze, and there remains the oral or nuncupative part; that is, the stipulation. This is certainly asking us to make a very clean sweep of the *nexum*; a demand certainly not encouraged by the example of testaments. When the Praetor remodelled the testament made by *mancipatio*, he retained seven witnesses, five of whom represented

the old five witnesses, one represented the balance-holder, and the other the *familiae emptor*. To a stipulation, however, no witnesses were necessary. This was a real defect, for which not even an imperfect remedy was provided, until the habit of committing stipulations to writing became general.

But there is a stronger answer to M. Ortolan. Drop the ceremonial part of the *nexum*, he says, and there remains the nuncupation; that is, the stipulation. There could not be a greater fallacy. The nuncupation is not the stipulation. It is a mere verbal statement. But a verbal statement (unless in the form of question and answer) is a *pact*, not a stipulation. There is no greater opposition within the law of contract than that between a *pact* and a stipulation. A *pact* was not supported by action; a stipulation was a contract *juris civilis*. We might be tempted to listen to the hypothesis, unsupported as it is by positive evidence, if it explained the facts, but that is exactly what the hypothesis in question does not do.

Two things in the beginning, one thing always, characterised the stipulation. In the beginning, the word *spondeo* alone could be used—alone had any legal effect; from the first and always, the verbal statement must be in the *interrogative form*. Does the *nexum* throw any light on the exclusive value of the word *spondeo*? None whatever, for there is no evidence connecting that word with the mancipation. Does it explain the interrogative form, which, looking at the subject historically, may be called the essence of the contract? Not any more, for every formula handed down to us as belonging to the transaction *per aes et libram* is direct and categorical, not interrogative. So far, therefore, as the evidence is worth anything, it tells the other way. Perhaps it may be suggested that the interrogative form was adopted in place of the fictitious sale *per aes et libram*. But that again is mere conjecture; itself a hypothesis to support a hypothesis. The conclusion, therefore, seems unavoidable, that the hypothesis of the derivation of contract from conveyance, through the *nexum*, is not supported by evidence.

It is clear that if the stipulation was derived from the *nexum* it must have been prior to the XII Tables, and that means really in the prehistoric age of Roman Law. The burden of proof rests with those that affirm a connection between the stipulation and the *nexum*. The absence of positive testimony would not be conclusive; for although the stipulation may have been carved out of the *nexum* in prehistoric times, traces of the operation might continue until within the historic period. But no such traces have been indicated. The *nexum* had five witnesses; the stipulation required none. In the examples of *nexum* that we know the action was *bonae fidei*; in stipulation, the remedy was *stricti juris*. So far, then, as the records of Roman Law help us to a conclusion, the suggestion that "contract" is the offspring of "property" seems really to have no other support than its own inherent fascination.

The circumstance that we know very little, indeed almost nothing, of the *nexum*, but that the materials for a history of the stipulation are tolerably abundant, may be explained by saying that the *nexum* belongs to a hoary antiquity, and was superseded by its more versatile and useful child, the stipulation. But it may also be explained by the suggestion that the *mancipatio* was never perverted for the purpose of contract except in a very few cases, and that these lost nearly all their importance as soon as the Praetor introduced equitable actions.

Fifth, EXTENSION OF EQUITABLE CONTRACTS.

I.—INNOMINATE REAL CONTRACTS.

Paul in a well-known formula sums up all the cases of innominate contract. Either, says he, I give something to you

in order that you may give something to me, or I give something to you in order that you may do something to me; or I do something to you in order that you may give something to me, or I do something to you that you may do something to me. (*Do tibi ut des; do ut facias; facio ut des; facio ut facias.*) (D. 19, 5, 5, pr.) This classification proceeds upon the distinction between a promise to do and a promise to give, so familiar to Roman lawyers, owing to the difference between a definite and an indefinite demand (*certa* and *incerta intentio*). In itself, however, it is a distinction without much logical value—the general word “to do” including “to give.” It omits, moreover, the negative form “not to do,” for that may equally, with the positive form, be the object of a promise. Paul’s formula ought to be co-extensive with every kind of contract, and had better be expressed thus:—

I do something in order that you may do something. *Facio ut facias.*

I do something in order that you may not do something. *Facio ut non facias.*

I abstain from doing something in order that you may do something. *Non facio ut facias.*

I abstain from doing something in order that you may not do something. *Non facio ne facias.*

It will be convenient, however, to arrange the illustrations according to the *formulae* of Paul, in order to bring out more clearly the analogies between the innominate and the other contracts.

I. *Do ut des.* I give that you may give.

1. Analogy to sale. Exchange (*Permutatio*).

The comparison of sale—the giving of a thing for money, with exchange—the giving of one thing for another, is instructive. Sale is a consensual contract, but exchange is not. Hence a mere agreement to exchange was without obligatory force until one of the parties had given what he promised. (D. 19, 4, 1, pr.; D. 19, 4, 1, 2; C. 4, 64, 5.) Moreover, the duty of exchange was different from sale. The seller was not bound to make out a good title; even if he sold what was not his own, the contract of sale was good, and he was bound simply to compensate the buyer when evicted. But in exchange, both parties were bound to make a good title; and hence if one delivered what was not his own, the contract was wholly void. (D. 19, 4, 1, 3.)

Illustration.

A gives B a vase, B promising to give A in exchange a horse. B refuses to do so. What is A's right? To the horse, or only to the return of the vase? In one passage, Paul is made to say that A's right is merely to the restitution of his vase (D. 19, 4, 1, 4); but in another passage he says that A has an option, and may, in his own discretion, demand either the restitution of the vase, or damages for the non-delivery of the horse. (D. 19, 5, 5, 1.)

In exchange, as in sale, pending delivery the thing remained at the risk of the person to whom it was to belong, and he that was bound to deliver was responsible only for reasonable care. (D. 19, 5, 5, 1.)

2. Analogy to sale. Variations, by agreement, in the essence of the contract.

Changes could be made in the contract of sale within very extensive limits. But no variations were permitted in the essential characteristics. If a contract were made resembling sale, but differing in an essential feature, it would not be a consensual contract, but could be enforced only as an equitable contract.

Illustrations.

Julius gave Attius 5 *aurei*, Attius undertaking to give Julius the ownership of the slave Stichus. Before being delivered, Stichus died. Could Julius demand back his money? If it were a sale he could not, because the risk attached to the buyer from the moment of the sale. But the obligation in sale was not to make out a good title; it was simply to deliver. This case, therefore, is not a sale, and Attius being unable to give Stichus, who has died, must refund the money. (D. 12, 4, 16.)

Lucius Titius agrees to give Gaius Seius a pearl, to be returned within two months, or its value, estimated at 10 *aurei*, paid. This was not sale, because Gaius Seius had the option of returning the pearl: nor letting on hire, because there was no consideration, no sum agreed on for the use of the pearl: nor mandate, because if Gaius Seius could sell the pearl within two months for more than 10 *aurei*, he was to keep the balance: nor partnership, because if there was any profit, it all went to Gaius Seius. (D. 19, 3, 1, pr.; D. 19, 5, 13, pr.) As such an agreement did not fall within any of the consensual contracts, Gaius Seius could not compel Lucius Titius to give him the pearl; but if Titius had done so, he could by an action *in factum* compel Gaius Seius to restore the pearl within two months, or pay its value. (D. 19, 3, 1, pr.) From its special character this was sometimes called the *actio de aestimato*.

Suppose now, before Gaius Seius has sold the pearls, or the two months have expired, the pearls have, without his fault, been lost, who is to bear the loss? Ulpian, repeating the opinion of Labeo and Pomponius, says that if Titius asked Seius, Titius must bear the loss; if, on the contrary, Seius asked Titius, Seius must bear the loss; if neither specially was responsible for the negotiation, then Seius was to answer only for reasonable care. (D. 19, 5, 17, 1.) This is an example of the general rule determining the amount of care exigible in contracts. If Titius made the request, then presumably Seius acted out of favour; if Seius made the request, presumably it was for his own profit; if neither specially, then presumably it was for the benefit of both; in which case both parties answer for due diligence, but not for accidental loss.

3. Analogy to Letting on Hire.

Illustration.

Titius gives the loan of his slave Stichus, who is a carpenter, for a month to Gaius, Gaius agreeing to give him in return an equal time of Pamphilus, also a carpenter. Gaius refuses to do so after Stichus has been with him for a month. Titius cannot sue for hire, because an exchange of the use of slaves is not a price (*merces certa*). Inasmuch, however, as he has actually lent Stichus, he can by the *actio in factum* compel Gaius to give him the use of Pamphilus. (D. 19, 5, 25.)

4. Analogy to *Mutuum* or *Mandatum*.*Illustrations.*

Licinius asked Victor for a loan of money. Victor having no money, gave him a vase to sell, and to take the price of it as a loan. Licinius sold the vase, but did not use the money. By what action can Victor recover it? He cannot sue for it as a loan, because until Licinius has used the money there is no *mutuum*. Neither is this a mandate, because it was not the intention of either party that Licinius should be the agent of Victor. But as Victor had delivered the vase, he could recover the price of it by the *actio in factum*. (D. 19, 5, 19, pr.)

Titius gave Sempronius 30 *aurei*, to be let out at interest by the latter. Sempronius undertook to pay the tribute due by Titius, Sempronius being charged with interest at the rate of 6 per cent. per annum. If that allowance of interest exceeded the tribute, the excess was to belong to Titius; if it was less, the deficit was to diminish the principal: if the tribute swallowed up more than the principal and interest, Titius must refund the excess to Sempronius. No stipulation was made. The interest, taking it at 6 per cent., exceeded the amount of the tribute. By what action could Titius recover the surplus? Not by the *actio ex mutuo*, because as Sempronius was not bound to return the principal in the event of its being lost without his fault, the transaction was not a loan. Nor was the contract a mandate, for if Sempronius got more for the money than 6 per cent., he kept the excess to himself. The remedy, then, was by *actio in factum*. (D. 19, 5, 24.)

5. Analogy to Deposit.

Illustrations.

Titius and Seius make a wager (*sponsio*), and each deposits a ring with Sempronius, who engages to give both to the winner. Titius wins. Sempronius refuses to give up either ring. Titius can sue him by the *actio in factum praescriptis verbis*; not for deposit, because he did not deposit Seius' ring. (D. 19, 5, 17, 5.)

Cornelius gives money to Seius to give to Titius, if he succeeds in bringing back the fugitive slave of Cornelius. Titius fails, and Seius refuses to restore the money. This is not a case of deposit, because Seius undertakes not merely the custody of the money, which is all that is involved in deposit, but also a special trust to give the money to Titius in a certain event. Cornelius will, therefore, recover his money by the *actio in factum praescriptis verbis*. (D. 19, 5, 18.)

6. Analogy to *Commodatum*.*Illustrations.*

Titius and Gaius are walking by the Tiber, when Titius asks to see Gaius' ring. While looking at it, he lets it fall, and it rolls into the Tiber, and is lost. Merely

looking at a ring hardly constitutes a use within the meaning of *commodatum*, but Titius could be sued by the *actio in factum* for failing to return the ring after he had looked at it. (D. 19, 5, 23.) If the ring had been struck out of his hand without any fault on his part, Titius would not have been responsible. (D. 19, 5, 17, 2.)

Seia shows a ring to Julius, who undertakes to ascertain its value. This is neither a deposit nor a loan (*commodatum*) of the ring. Suppose, then, Julius refuses to give it back, or by his negligence loses it, what remedy has Seia? Or suppose Julius sends it by a careless servant, who loses it on the way. If Seia wished to sell the ring, and Julius gratuitously undertook to make enquiries for her, he is not answerable merely for his own or the messenger's negligence; but if Julius for his own purposes procured the custody of the ring, he was bound to answer for his own negligence, and also for the messenger's, if the latter was not a trustworthy person. (D. 13, 6, 10, 1; D. 13, 6, 11; D. 13, 6, 12; D. 19, 5, 1, 2.)

Calpurnius wished to buy plate, and Titius, a goldsmith, sent some for inspection. This is evidently neither deposit nor loan. Calpurnius did not approve the specimens, and sent them back by his slave Stichus. On the way Stichus was beaten and robbed of the plate. The loss falls on Titius. If, however, it had been stolen from Stichus, his master would have had to pay for his negligence. (D. 19, 5, 20, 2; D. 19, 5, 17, 4.)

Titius gives Seius some cups, Seius undertaking to return either the cups or their weight of equally good silver. This is not *commodatum*, because the obligation is not to return the identical cups, and the remedy is by the *actio in factum*. (D. 19, 5, 26.)

Titius owes money to Maevius, and Maevius to Sempronius. Titius, in order to procure delay from Maevius, gave him some golden vessels that he might give them as a pledge to Sempronius. This is not a *commodatum* with Maevius, because there is a consideration for the use; nor is it *locatio conductio*, because the consideration—the granting a respite to Titius—is not a pecuniary one. (D. 13, 7, 27.)

II.—DO UT FACIAS.

1. Analogy to Letting on Hire.

Illustrations.

Titius repairs the house of Gaius on condition that Gaius shall repair a house of Titius. This is not *locatio conductio*, because it is an exchange of services for services, not of services for money. Gaius must, however, repair the house of Titius, or be amerced in damages by the *actio in factum*. (D. 19, 5, 5, 2.)

Julius allows Attius to dig for chalk in his land, Attius agreeing to fill up the excavations. Attius does not do so. He may be sued by Julius by the *actio in factum*. (D. 19, 5, 16.) The *actio locati* would not lie, because no rent was paid for the use of the land.

Sempronius gives his slave Stichus to Maevius, who undertakes to manumit him. After the time agreed upon, or a reasonable time has elapsed, Maevius fails to manumit Stichus. Sempronius can either reclaim the slave (by a *condictio*), or ask damages for non-performance of the agreement if the slave has been injured or made away with. (D. 19, 5, 5, 2.)

Sempronius gives Maevius 10 *aurei* as an inducement to him to manumit his slave Pamphilus. Maevius delays the manumission. Sempronius can then sue Maevius for damages if he would have derived any benefit from the manumission of Pamphilus. If, however, Sempronius derives no benefit from the manumission, he can reclaim his money. (D. 19, 5, 7.)

Sempronius gives his slave Stichus to Maevius on condition that Maevius shall manumit his slave Arethusa. Maevius manumits Arethusa, and afterwards is evicted from Stichus, who is taken from him in a lawsuit at the instance of the true owner. If Sempronius knew that he was not owner his conduct is fraudulent, and he would be amenable to the *actio de dolo*; if he were a *bona fide* possessor, he is still liable in damages by an *actio in factum*. (D. 2, 14, 7, 2.)

III.—*FACIO UT DES.*

At this point the analogy, with the nominate contracts, becomes weak, and considerable doubt prevailed, even in the time of Paul, whether in the absence of fraud such contracts could be enforced. But the texts are quite clear that in this case also the principle of the equitable contracts should apply.

Illustrations.

Titius having lost a slave, offers a reward to the finder. Gaius pursues and restores the slave. Has Gaius any right to recover the promised reward? Ulpian observes that such a promise could not be called a nude pact, incapable of supporting an action; what it was, however, he felt some difficulty in stating (*habet in se negotium aliquod*). Ulpian at this point nearly struck upon the principle of valuable consideration; but he goes off without making the discovery, and says the remedy is the *actio in factum*, unless perhaps the action for fraud would lie (*actio de dolo*). (D. 19, 5, 15.)

Seia wrote a letter to Lucius Titius, saying that if he still had the affection for her that he once had, he was, on receipt of the letter, to sell his property and go to her; and she promised him a salary of 10 *aurei* a year during her life. Titius sold off his property and went. If there was nothing improper (*contra bonos mores*) in the arrangement, he could recover the salary. (D. 44, 7, 61, 1.)

IV.—*FACIO UT FACIAS.*

Illustrations.

Titius has a slave Stichus, the son of Gaius, and Gaius has a slave Pamphilus, the son of Titius. Titius agrees to manumit Stichus, and Gaius to manumit Pamphilus. Titius does so; but Gaius refuses. Titius has an action (*in factum praescriptis verbis*) against Gaius to recover the value of Stichus, whom he has manumitted. (D. 19, 5, 5.)

Titius has a debtor in Carthage, and Gaius a debtor in Rome. Titius and Gaius agree that Titius shall collect and keep the debt in Rome, and Gaius collect and keep the debt in Carthage. This resembles mandate, but differs from it in a material point. If each collected the debt as agent at the cost and risk of the principal, it would be mandate; but in this contract they exchange debts, and each takes upon himself the whole cost and risk of collection. On the other hand, it might be said that the expense incurred by one is a set-off to the expense incurred by the other; and it might be argued that in collecting the debt each acts as an agent, but that the responsibility of each as principal has been compounded by special agreement. Paul, however, considers it the safer course to treat the case not as mandate, but by the *actio in factum praescriptis verbis*. (D. 19, 5, 5, 4.)

Sempronius and Maevius mutually agree that Sempronius shall put up a building on the land of Maevius, and Maevius build on the land of Sempronius. In this case, also, the safest remedy, if Sempronius has built and Maevius refuses, is the *actio in factum praescriptis verbis*. (D. 19, 5, 5, 4.)

Sixth, EXTENSION OF CONTRACTS FOR VALUABLE CONSIDERATION.

AGREEMENTS (*Pacta*).

The class of consensual contracts, like that of equitable contracts, was at first limited to a small number of specified agreements. But just as the principle of the equitable contracts suggested and necessitated the class of innominate real contracts, so the principle of the consensual contracts would seem to justify a wide extension of the class of contracts in which consent alone should give rise to actions.

But this step was not taken. The jurists failed to extract the principle of valuable consideration from the contracts where it was implicitly admitted. The Roman Law refused to enforce any promise the value of which could not be measured in money; if it had gone so far as to proclaim that there must be a consideration also of money or money's worth, it would have attained the goal to which it was constantly and unconsciously tending, but which it never actually reached. We have now to consider how far the Romans succeeded in filling up the blank in their system due to their failure to apprehend and apply the principle of valuable consideration.

With regard to an agreement between any two persons containing any unfulfilled promise, the law may take one of several courses. (1) It may regard the promise as wholly void, so that even if it is fulfilled, it will order restitution. (2) It may not go so far as to order restitution, but it may refuse in any way to give effect to the promise, if the promiser declines to fulfil it. (3) If there are reciprocal promises, it may recognise the agreement so far as to refuse its assistance to a promisee, with reference to that agreement, unless he also performs his promise. (4) It may compel the promiser to fulfil his promise, or answer in damages for non-performance. In respect of the two first-mentioned courses, we may briefly say that the agreement, in law, is void. The last two courses indicate a difference of treatment adopted by the Roman Law. Those agreements (with the limitation presently to be noted) that the law does not directly enforce, but which it recognises only as a valid ground of defence, are

called Pacts (*Pacta*). Those agreements that are enforced—in other words, are supported by actions—are called Contracts (*Contractus*). These terms are ancient. *Pactum* is found, as a verb, in the XII Tables. The thing, if not the name of contract, is still more ancient. *Contractus* was the name for all those conventions or agreements that were recognised and enforced by actions. The exceptions are few, belong to a late period, and will be duly signalled.

HISTORY OF PACTS.

1. *Pacts in relation to Delicts.*

In the XII Tables a provision is made that if one breaks the limb of another, unless he is forgiven, he must submit to his own being broken. (*Si membrum rupsit ni cum eo pacit talio esto.*) The punishment of retaliation could not be avoided except by coming to terms with the injured person. This is an example of the rule that an agreement to waive an action for a delict is binding, and a good answer to the action. (D. 2, 14, 7, 14.) The effect of such a pact was entirely to take away the sufferer's right of action. A special defence was not necessary, but if it appeared in evidence that the sufferer had agreed not to sue the wrong-doer, he was defeated. (D. 2, 14, 17, 1.)

2. *Pacts in relation to the Divestitive Facts of Contract.*

At some period, which it would be difficult to determine, but which was certainly before the time of Cicero (*De Orat.* 2, 24; *Pro Publio Quintio*, 5), the Praetor inserted a provision in his edict, making a pact a good defence to an action on contract, as well as to an action on a delict. He said (D. 2, 14, 7, 7), "I will support all pacts that do not sin against good faith or any Statute, *Plebiscitum*, *Senatus Consultum*, or Imperial Constitution, and which are not an evasion of these."¹

The pact specially in view of the Praetor was doubtless the pact of release (*de non petendo*). Each contract had its special divestitive as it had its special investitive facts. A contract *per aes et libram* could be dissolved only *per aes et libram*. A literal contract was terminated by writing; a stipulation by a stipulation. A mere verbal release from a formal contract had no effect. But it would have been against good conscience to allow a person to reimpose upon another, by taking advantage

¹ *Pacta conventa, quae neque dolo malo, neque adversus leges, Plebiscita, Senatus Consulta, edicta principum, neque quo fraus cui eorum fiat, facta erunt, servabo.*

of the forms of law, an obligation that he had deliberately, though informally, cancelled. The Praetor, therefore, by inserting an *exceptio* in the pleadings, practically enabled any contract to be dissolved by mere consent, without any formality. A technical distinction was still preserved. When a contract was dissolved by its appropriate divestitive fact, it was said to be extinguished *ipso jure*, so that it could no longer support an action. But when the release was made by a pact, the contracts of *stipulatio*, *expensilatio*, and *mutuum* were not held to be dissolved; on the contrary, they were still in contemplation of law subsisting, but if attempted to be enforced would be defeated by the insertion of a special defence in the pleading (*exceptio pacti*).

Moreover, if a debtor has agreed with his creditor that he shall not be sued for payment, still none the less he remains under the obligation. For by a mere agreement obligations are not in every case dissolved. The action is therefore available against him in which the plaintiff uses as his *intentio* *SI PARET EUM DARE OPORTERE* (if it appears that he ought to give). But it is unfair that, despite his agreement, he should be condemned; and therefore he can defend himself by the *exceptio pacti conventi*. (J. 4, 13, 3.)

Thus, in effect, although not in form, the Praetor, by sanctioning informal releases, took away all necessity for resorting to the formal releases. In other words, the pact of release superseded the formal divestitive facts.

3. *Pacts in relation to the Investitive Facts of Contract.*

In describing the consensual contracts, attention was drawn to the distinction between those rights and duties that were annexed to each contract by law, and those that were added by special agreement of the parties. Such a special agreement was called "added pact" (*pactum adjectum*). (D. 2, 14, 7, 5.) The effect of such a pact differed according as the contract was *stricti juris* or *bonae fidei*. The *stipulatio*, *expensilatio*, and *mutuum* are contracts *stricti juris*; all others are *bonae fidei*.

(1.) In contracts *bonae fidei* a pact had a different effect, according as it was made at the time of the contract and as part of it, or subsequently. Those made at the time of the contract, and as part of it (*in continenti*), were of equal validity with the contract itself (*pacta conventa inesse bonae fidei judiciis*). (D. 2, 14, 7, 5.) This would seem to be a plain dictate of common sense. In a consensual contract, for example, where no form was required, what could be more reasonable than to give

effect to the pacts or agreements made by the parties? And yet, as we have seen in tracing the history of the contract of sale, that view was by no means at first accepted by the Roman Law. Variations or additions to the primitive or naked contract of sale could at first be made only by the solemn form of stipulation, and were enforced by the action given to stipulation. At length, however, the liberal opinion of Sabinus triumphed, and it was held that all terms agreed upon by the parties to a contract *bonae fidei* as part of the contract were to be enforced by the same action as the contract itself. (D. 18, 5, 6; D. 18, 1, 6, 1; D. 19, 1, 11, 6; D. 19, 1, 11, 3; D. 18, 3, 4.)

Pacts made not at the time of the contract, but subsequently (*ex intervallo*), either varying the terms of the contract, or wholly or partially dissolving it, could be used as a defence (*exceptio*) to an action on the contract. But it did not follow that such a pact would support an action. For the rule here applied, that a nude pact was available as a plea in defence, but could not be enforced by action.¹ The distinction is not without reason. A pact made at the time of the contract is within the consideration of the contract; but a pact made subsequently is either gratuitous or supported by a new consideration. It would, therefore, be quite logical and consistent to refuse to subsequent pacts any effect except by way of defence.

The rules adopted by the Roman jurists were as follows:—If the subsequent pact affects the essence of the contract (*natura* or *substantia contractus*), such as the price in a contract of sale, it is in fact a new contract relating to the same subject-matter as the old, and superseding it. It therefore gave rise to an action. If, however, the pact does not vary the essence of the contract, but only such collateral rights and duties as could have been inserted at the making of the contract, it cannot be enforced by action, but is, as in other cases, available only as a plea in defence. (D. 18, 1, 72, pr.; D. 2, 14, 7, 5.)

Illustration.

Titius buys a slave from Maevius; and after the sale it was agreed that Maevius should give the usual security against eviction with sureties. If, now, Maevius refuses to give sureties, he cannot be sued upon the pact; but if he has not got his price, he will be repelled in suing for it if he does not give the sureties according to his promise. If he has actually received his price, the buyer has no remedy. (D. 18, 1, 72, pr.)

¹ *Nuda pactio obligationem non parit. Sed parit exceptionem.* (D. 2, 14, 7, 14.)

2. In contracts *stricti juris* the rule was somewhat different. A subsequent pact (*pactum ex intervallo*) relating to a *stipulatio*, *expensilatio*, or *mutuum*, has no other effect, in any case, than as a defence (*exceptio*). It is even a question whether a pact made at the same time as the contract, with the view of modifying it, could be treated as part of the contract. In the case of *stipulatio* and *mutuum*, however, to some extent this was admitted. Thus, if all the terms of the contract were not embraced in the stipulation, but some were omitted, these were regarded as contained in the stipulation. (D. 12, 1, 40.)

Illustrations.

An agreement was made for a loan, and that so long as interest was paid the principal should not be demanded. The return of the money was promised by stipulation, without any reference to the agreement about the return of the principal. It was held that the condition must be regarded as if it had been part of the stipulation. (D. 2, 14, 4, 3.)

I give you 10 *aurei*, and you agree to repay 20. The debtor is not bound to restore more than 10. (D. 2, 14, 17, pr.)

I give you 10 *aurei*, and you agree to repay 9. The debtor is bound to repay 9, and not more. (D. 12, 1, 11, 1.)

PACTS ENFORCED BY ACTION.

A simple agreement (*pactum*) could not originate a contract. It was used to dissolve a contract, or to vary and amplify the usual terms of a contract, but not to create one. Pacts were auxiliary to contracts. But in a very few cases, pacts were, to employ a common metaphor, clothed with actions, and thus practically elevated to the position of the consensual contracts. The cases are, indeed, fewer than is sometimes stated. Thus, an agreement of compromise (*transactio*), unless there was a stipulation, could not support an action. (D. 2, 15, 2; C. 2, 18, 37.) But in two cases the Praetors, and in two others the Emperors, did undoubtedly raise certain pacts to the level of contracts. To the Praetor is due the pact of *hypotheca*, which has been already described. Even more ancient than *hypotheca* is the *pactum de constituto*, which, as mainly a form of suretyship, will be discussed under the head of Accessory Contracts.

The Emperors Theodosius and Valentinian enacted in A.D. 428, that a mere agreement to give a dowry should be binding without any *stipulatio*. (C. 5, 11, 6.) Thus was added to the investitive facts of the *dos* the *pactum de constituenda dote*.

Finally, Justinian sanctioned the greatest change of all—the *pactum donationis*. Before this, a promise without consider-

ation was not valid, unless made by stipulation. (Vat. Frag. 264^a: 263: 310.) Justinian put a promise to give a thing gratuitously on the same footing as if a price had been agreed upon. Up to this time an agreement, not involving a valuable consideration, required either to be invested with a solemn form (*nexum, stipulatio, expensilatio*), or to have been performed by one of the parties, to give it legal validity. By giving an action to support a mere informal promise of a gift, Justinian departed from the unbroken tradition of Roman Law. He may have been led to adopt this course by one of two reasons. In the first place, the formal contract—the *stipulatio*—had lost much of its solemnity; it was divided by a very thin line indeed from a pact. The stipulation was in the form of question and answer; the pact was not. Even this thin partition was removed if the agreement were put in writing, for an allegation in writing that the form of stipulation had been observed, could not be overthrown by calling evidence to prove that it had not. But, in the second place, Justinian had mainly in his eye gifts for pious purposes. He declares with warmth, that when gifts are promised to religious persons or for pious uses, to refuse fulfilment merely on account of the absence of a legal formality showed not only a want of moral principle, but endangered the salvation of the promise-breaker—provoked not merely an action at law, but the wrath of Heaven. Justinian, therefore, enacted that all promises of gifts should bind, not only the promiser but his heirs, as well as be executed even to the heirs of the promisee. (C. 8, 54, 35, 5.)

SECOND PART.—CORREALITY. MORE THAN ONE CREDITOR OR DEBTOR.

(IN SOLIDUM OBLIGARI—CORREI.)

The addition of a person either as *creditor* or *debtor* may make substantially no difference. Thus, if A and B promise to C 100 *aurei*, it may be the same as if A promised 50 *aurei* to C, and B other 50 *aurei*; or if A promises B and C 100 *aurei*, it may be that he owes each of them simply 50 *aurei*. In these cases A is said to owe a *pars virilis* to each. (D. 45, 2, 11, 1; D. 45, 2, 11, 2.) But there may be a more intimate relation between them; the creditors or debtors may be regarded as, in some respects, one creditor and debtor. In this case, correality or solidarity exists.

DEFINITION.

Obligations of this sort make the whole due to each stipulator, and bind each promiser for the whole. And yet though there are two obligations, one thing only turns on them. If, therefore, on either side any one receives what is due or pays it, he puts an end to the obligation of all, and sets all free. (J. 3, 16, 1.)

Two joint-creditors are called *correi stipulandi* or *credendi*.

Two joint-debtors are called *correi promittendi* or *debendi*. (D. 34, 3, 3, 8.)

Correality may exist in contracts of service (*faciendi*) as well as in contracts relating to property (*dandi*). Thus, a workman may promise to work for two employers, each of whom would be entitled to exact his service; but performance to one discharged the obligation: or two workmen of equal parts or skill may promise their services, one or other of them, to a single stipulator. (D. 45, 2, 5.)

RIGHTS AND DUTIES.

I. Duties of *correi promittendi* to the creditor, and rights of *correi stipulandi* against the debtor.

1. Each debtor (*correus*) may be compelled to pay the whole or any part of the debt; and each creditor may exact the whole or any part of the debt. (C. 8, 40, 2; D. 45, 2, 3, 1; D. 30, 1, 8, 1; D. 19, 2, 47.)

2. If one creditor receives the whole or part of the debt, the other creditors are wholly or *pro tanto* discharged; if one of the debtors pays the whole or part of the debt, the other debtors are wholly or *pro tanto* released. (D. 46, 2, 31, 1; D. 46, 3, 34, 1.)

But when a debtor is released by a cause that does not affect the joint obligation, as if he is made captive and enslaved, the other debtors are not to any extent released. (D. 45, 2, 19.)

II. Duties of the *correi* towards each other. Can each debtor require his co-debtors to contribute to the payment? Can each creditor require from his co-creditor a share of what he has obtained from his common creditor? These cases have to be considered separately.

1. Joint-creditors as between themselves.

Savigny has examined the subject in an exhaustive manner, and it will be enough to state his conclusions. He thinks the case of joint-creditors a simple one. In the first place, they may be partners (*socii*), in which case contribution could be

demanding by each from the others. If they were not, each creditor might well be regarded as having given a mandate to all the rest to join in the obligation, and thus would be entitled to recover his share by the usual action for mandate (*actio mandati*). This seems not improbable, and, at all events, it must have been seldom that two persons were joint-creditors, unless they were partners, more especially considering the wide extension given to that contract in the Roman Law.

2. Joint-debtors.

If the joint-debtors were partners, each could compel the other to contribute. If they were not, and they gave each other a mandate, each could compel the others to bear their share of the burden by the *actio mandati*. But when there was neither partnership nor express mandate, what was the remedy of a joint-debtor who had been compelled to pay the whole debt? The only help to the debtor was to obtain a transfer from the creditor of his right of action against the other debtors. The creditor was not allowed to recover against one of the joint-debtors without ceding to him his right of action against the co-debtors. (D. 30, 1, 57; D. 19, 2, 47.) [As to cession of actions, see Subdiv. II., Transvestitive Facts.]

The next step was to dispense with the formality of an actual transfer of the action. This appears to have been done first in the sale of an inheritance. The rule of the civil law was, that an inheritance was indivisible. But as it was often troublesome and inconvenient for the heir to wind up the estate, a practice grew up of selling the inheritance to a person willing to take the trouble. In law the heir alone could sue or be sued, but the purchaser brought actions in his name, and defended those brought against him. Thus in effect a sale was accomplished. At length, in the time of Antoninus Pius, actions could be brought directly by and against the purchaser. (C. 4, 39, 1; D. 2, 14, 16.) So in the case of the transfer of a right *in personam* (*nomen*), (C. 4, 39, 7), or even *right in rem*. (C. 4, 39, 9.) In numerous instances such fictitious (*utiles*) actions could be brought when a transfer of rights *in personam* ought to have been made. Although no text expressly applies this doctrine to the case of joint-debtors, yet Savigny thinks that at least, in the time of Justinian, a debtor that had been obliged to pay the whole of a common debt could have an action (*utilis*) against his

co-debtors without any actual transfer to him of the creditor's rights of action against those debtors. If so, the right of contribution was at last fully established.

INVESTITIVE FACTS.

Both in stipulating and in promising two or more may become parties. In stipulating, as when to the question put by all the promiser answers, "I undertake to" (*spondeo*). For instance, if two persons stipulate severally, and the promiser answers, "To both of you I undertake to give it." But if he had first undertaken to give it to Titius, and afterwards, when another asked him, had undertaken again, there would be two distinct obligations, and it would not be held that two parties joined in the stipulation. In promising again, two or more may become parties, as when after Titius puts the question, "Maevius, do you undertake to give five *aurei*?" "Seius, do you undertake to give the same five *aurei*?" each severally answers, "I undertake to." (J. 3, 16, pr.)

Illustrations.

In a written instrument it was stated that "Gaius and Titius stipulated for 100 *aurei*," but it was not said that they were joint-creditors (*duo rei stipulandi*). Each, then, is creditor for 50 *aurei*. (D. 45, 2, 11, 1.)

In another case it was written, "Julius Carpus has stipulated that so many *aurei* shall be given to him. We, Antoninus Achilleus and Cornelius Dius, have promised it." Dius and Achilleus each owe one half of the *aurei*, because it is not added that they made a joint promise (*singulos in solidum spondidisse*), so as to bind each for the whole. (D. 45, 2, 11, 2.)

Titius and Seius stipulate for 10 *aurei*, or Stichus, a slave of Titius. As Titius cannot stipulate for his own slave, the stipulation is good to him for 10 *aurei* only; but it is good to Seius for the alternative promise. As, therefore, the promises to Titius and Seius are not identical, they cannot be joint-creditors (*correi*). (D. 45, 2, 15.)

Sempronius deposits a slave in the custody of Gaius and Maevius. Maevius agrees to guard the slave with the care of a good *paterfamilias*. Gaius promises nothing. As the promises are not for the same thing, Gaius and Maevius are not joint-debtors (*correi*.) (D. 45, 2, 9, 1.)

It was not necessary, however, that the two *correi* should be made at the same moment. Thus a surety might be made between the first and the second debtor without preventing the debt from being joint. The interval must not, however, be great. (D. 45, 2, 6, 3.)

Of two parties to a promise, one can bind himself simply, the other for a particular day or conditionally. The introduction of that day or that condition will be no hindrance to claiming performance from him that bound himself simply. (J. 3, 16, 2.)

So a creditor may accept a surety from one of two joint-debtors, without also taking one from the other. (D. 45, 2, 6, 1.)

THIRD PART—ACCESSORY CONTRACTS.

Suretyship is the counterpart of mortgage. The object of mortgage was to strengthen the weak point of rights *in personam* by the addition of rights *in rem*; the object of suretyship is the same, by giving the creditor an action against two persons instead of one. Suretyship, then, is the creation of dependent rights *in personam*; that is, as security for other rights *in personam*.

But the early Roman Law furnishes us with a different and unique species of accessory contract; namely, the *adstipulatio*, by which a subsidiary creditor is added.

First—ADSTIPULATIO.

DEFINITION.

Although, as we have said, another person not subject to our power stipulates for us in vain, yet we can employ another person for that purpose, who must make the same stipulation as we do; and him we commonly call an *adstipulator*. (G. 3, 110, as restored.)

Under the system of ancient procedure, called *Legis Actiones*, no one could sue except the creditor himself in person. Agents could not be employed until the formulary procedure was introduced. But the ingenuity of the lawyers opened a way of escape from this inconvenience. A person was added in the stipulation, to whom, as well as to the *stipulator*, the promise was made; and who, therefore, had a right to sue without the concurrence of the *stipulator*. The *adstipulator* was thus practically a procurator, agent, or attorney, with this great drawback, however, that he was appointed not at the time the action was brought, but at the making of the contract. In the time of Gaius, procurators were allowed, and the chief reason for *adstipulatio* had ceased. But another still existed.

An *adstipulator* is usually employed only when we are stipulating that something is to be given after our death. A stipulation by us is in that case idle, and therefore an *adstipulator* is employed to act after our death. All he obtains he is bound to restore to our heir, and he may be forced to by the *actio mandati*. (G. 3, 117.)

A man could not make a promise to take effect after his death, because that would virtually have been to make himself agent for his heirs; and it was a stringent rule of the *ius civile* that one freeman could not represent another in any legal transaction. This rule was evaded by adding an *adstipulator*, who, if he survived the *stipulator*, could sue on the promise. In the time of Justinian, as will appear further on, a man might make a contract to take effect after his death; and thus the sole remaining reason for the *adstipulatio* was taken away. Justinian does not refer to *adstipulatio*.

RIGHTS AND DUTIES.

A. Duty of the Promiser (*reus promittendi*) to the *Adstipulator*.

On demand by the *adstipulator*, without the concurrence of the *stipulator*, the promiser must perform his promise; but such

performance at the same time releases him from his obligation towards the *stipulator*.

B. Duties of the *Adstipulator* to the *Stipulator*.

I. By him too, just as by us, an action may be brought and payment may be rightly made to him as well as to us. But all he obtains he will be forced to restore to us by the *actio mandati*. (G. 3, 111.)

II. The *adstipulator* ought not to release the promiser (*reus promittendi*) gratuitously. The *adstipulator* had precisely the same power as the *stipulator* to discharge the promiser; and if he did so gratuitously, the *stipulator* would be deprived of the benefit of the contract.

By the second chapter (of the *lex Aquilia*) an action may be brought against an *adstipulator* that has defrauded the *stipulator* by entering the money as paid, for the value of the property. (G. 3, 215.)

In that part of the statute the action is brought in evidently as an action on account of damage. But that provision was unnecessary, since the *actio mandati* was enough for the purpose,—unless, indeed, that by that statute an action for double the amount is given against a man that denies liability. (G. 3, 216.)

INVESTITIVE FACTS.

The *adstipulator* must stipulate for the same thing as the *stipulator*, and from the same person.

But the *adstipulator* can use other words as well, and not those we use. If, for instance, I have stipulated in these words, "Do you undertake that it shall be given?" then he can make the further stipulation thus, "Do you pledge your credit?" or, "Do you become surety for the same?" or *vice versa*. (G. 3, 112.)

Again, he can stipulate for less, but not for more. Therefore if I stipulate for ten *sestertia*, he can stipulate for five; but not for more than ten. And if I stipulate simply, he may stipulate conditionally; but not *vice versa*. Less and more must be understood not only of amount but of time; for to give anything at once is to give more, but after a time less. (G. 3, 113.)

REMEDIES.

A. To enforce Duties of Promiser.

I. *Condictio certi* and *actio ex stipulatu*.

In this branch of law there are some peculiar rules; for the heir to an *adstipulator* has no right of action. (G. 3, 114.)

The object of the *stipulator*—namely, to secure a particular individual as agent—would have been completely frustrated if the rights of the *adstipulator* had been transferred to his heir or other persons.

B. To enforce Duties of *Adstipulator*.

I. *Actio mandati*. (G. 3, 216.)

II. *Actio legis Aquiliae*, with penalty of double if the gratuitous release were denied. (G. 3, 216.)

Second—SURETIES.

First Case—WHEN THERE IS ONLY ONE SURETY.

The most general term in the Roman Law for the substitution or addition of a new debtor is *intercessio*. (Nov. 4, 1; C. 8, 41, 19.) When the original debtor is released, and the new debtor takes his place, the name is *expromissio*. This will be considered under the head of Transvestitive Facts. If the original debtor continues bound as well as the new debtor, the contract of suretyship exists (*adpromissio*). (D. 13, 5, 28.)

The Roman Law possessed no fewer than five different forms of contracts of suretyship; some of these are named by Gaius, one by Justinian.

For the promiser also others usually bind themselves. They are called [*sponsores, fidepromissores*], *fidejussores* (sureties); and creditors usually receive them in their anxiety to secure themselves more carefully. (J. 3, 20, pr.; G. 3, 115, 117.)

To these must be added *mandatum* and the *pactum de constituto*. The three forms mentioned by Gaius are made by stipulation. Probably these forms represent successive stages; *sponsio*, the earliest of all, is confined to Roman citizens; the *fidepromissio* is like the *sponsio*, but available for aliens (*peregrini*); and the *fidejussio* seems to be latest, as it was not dealt with by the early statutes affecting sureties.

DEFINITION.

I. *Sponsio* is a contract of suretyship by stipulation. It can be attached only to a verbal contract, and can be made by Roman citizens only. (G. 3, 93.)

II. *Fidepromissio* is a contract of suretyship by stipulation. It can be attached only to a verbal contract. It may be made by an alien. (G. 3, 93.)

The *sponsor* and *fidepromissor* are in much the same position; but the position of the *fidejussor* is very unlike theirs. (G. 3, 118.)

For they can join in no obligations that are not verbal, though sometimes the principal that promised is not bound himself, as when a woman or a *pupillus* acts without authority from the *tutor*, or when any one promises that something shall be given after his death. It is a question, however, whether when a slave or an alien has undertaken (*spondeo*) to do something, a *sponsor* or *fidepromissor* can bind himself on his behalf. (G. 3, 119.)

III. *Fidejussio* is a contract of suretyship by stipulation. It may be attached to any contract or *obligatio*, whether civil or only natural.

But *fidejussores* may be taken in as parties to every obligation, whether contracted *re*, by words, by writing, or by consent. Nor does it matter whether the obligation is part of the *jus civile* or of the *jus naturale*. So entirely is this the case that a man can bind himself on behalf of a slave, whether it is an outsider that accepts him from the slave as *fidejussor*, or the slave's master for what is naturally due to him. (J. 3, 20, 1; G. 3, 119.)

This extensive application of *fidejussio* distinguishes it broadly from *sponsio* and *fidepromissio*, and puts it on the same footing as *pignus* or *hypotheca*. A civil contract or obligation, within the meaning of the Institutes, is any contract or delict upon which an action may be brought. A natural obligation (*naturalis obligatio*) has been already defined.

IV. *Mandatum*.—When A at the request of B lends money to C, the Roman Law imposed on B an obligation to save A harmless from all loss sustained by the default of C to repay the money. B is surety (*mandator*), A is creditor (*mandatarius*), and C the principal debtor. Two peculiarities distinguish this case from *fidejussio*.

1. After the *fidejussor* has given his word, he is absolutely bound, and cannot be released without the consent of the creditor. After B has requested A to lend money to C, B can at any time withdraw before A has actually advanced the money. A has no claim for indemnity against B until he has executed the mandate.

2. A *fidejussio* could be made at any time *after* the obligation to which it was attached (D. 46, 1, 6); a mandate must necessarily precede the contract to which it is really subsidiary. Thus, if A, without the request of B, had lent money to C, and B afterwards said he would answer for any loss, A would have no action against B. A man cannot give an authority to do that which is already done. If, however, in the same circumstances, B by stipulation promised to answer for C, B would be a *fidejussor*, and would be compelled to make good the loan.

3. *Pactum de constituto, Constituta Pecunia.*

Actions *in personam*, too, have been put forth by the Praetor in the exercise of his jurisdiction; as, for instance, that *de pecunia constituta*, which the *receptitia* closely resembled. But by a constitution of ours, all the advantages of the latter have been transferred to the former; and the latter having thus become superfluous, has by our orders disappeared with all its influence from our statutes. (J. 4, 6, 8.)

The *actio de pecunia constituta* may be brought against any one that has engaged to pay money, either for himself or for another, without any stipulation coming in. For if not—that is, if he has promised to a stipulator—he is liable under the *jus civile*. (J. 4, 6, 9.)

Theophilus, in his Commentary on the above passages, gives the following account

of the introduction of this Praetorian Pact. Suppose A owes B 100 *aurei*, and is sued by B for the amount. The proceedings go on until the parties leave the Praetor's Court (*litis contestatio*); but before going to trial by the *iudex*, A admits B's claim, and promises, if he will not further press the suit, to pay him the amount by a day named. The effect of withdrawing at this stage was that the original demand was extinguished. When the day arrives, A refuses to pay. What is B's remedy? If there had been a stipulation, B would have had an action; but as it is, he is left without remedy. This is in consequence of his own liberality and A's want of faith. (D. 13, 5, 1.) A stronger case for dispensing with the form of stipulation could scarcely be conceived. Accordingly, before the time of Cicero, the Praetor introduced the remedy by the *actio de pecunia constituta*.

Prior to Justinian, the *pactum de constituto*, as a mode of constituting suretyship, laboured under several disadvantages that may be traced to its origin. It was confined to promises respecting fungible things—that is, things dealt with by number, weight, or measure. At first also it appears that the obligation concerning which the pact was made must be actually vested; that is to say, it must not be conditional or suspended for a time (*sub conditione* or *in diem*). A day also must have been originally named for payment, but Paul held that if no time were fixed, ten days' grace should be allowed before an action could be brought. (D. 13, 5, 21, 1.) Lastly, in many cases the action must be brought within a year.

Justinian fused, as he states in the text, the *actio de pecunia constituta* and the *actio receptitia*. The latter was the remedy for an ancient contract, couched in certain formal terms (*solemnibus verbis composita*), and confined exclusively to contracts with bankers (*argentarii*). It could be brought against a banker when he had promised to pay a sum on behalf of a customer on a day named. (Theoph. Inst. 4, 6, 8.) This contract was not confined to fungible things, but was as extensive as stipulation. Justinian abolished this special action, and gave against the banker the ordinary *actio de constituta pecunia* as amended by him. His alterations had the effect of putting the *pactum de constituto* on as wide a basis as *fidejussio* or *mandatum* as a mode of appointing sureties. There must be a prior debt, but it may be a natural obligation only (D. 13, 5, 1, 6; D. 13, 5, 1, 7), and the promise may refer to anything that could be the object of a stipulation. (C. 4, 18, 2, pr.) The short term of prescription was entirely taken away.

The *pactum de constituto* may now be defined as a promise made by any one to discharge an existing obligation of another on a day named, or to give security for its fulfilment. (D. 13, 5, 28; D. 13, 5, 21, 2.) In what respect, then, does this informal agreement (pact) differ from the stipulation (*fidejussio*)? Both *fidejussio* and *constitutum* are accessory to an existing obligation, and in this respect are both contrasted with *mandatum*. In form the difference between them is simply that one is made by interrogation of the surety, the other without. Apparently, then, the only distinction is that *fidejussio* contemplated as possible an immediate liability of the surety; whereas the *pactum de constituto* postponed the liability of the surety to a future day. This difference, apparently trivial, rests upon a sound basis. In *fidejussio* there need be no valuable consideration; but in the pact there was a consideration—namely, the forbearance of the creditor to sue;

for the essence of the contract was to give time to the debtor.

If this be the true account of the difference between *fidejussio* and the *pactum de constituto*, it throws light on a somewhat remarkable rule. It was held that if, through some formal defect, a *fidejussio* failed, it was not to be construed as a *pactum de constituto*; for, says the Jurist, the intention of the parties was to make the stipulation, not the pact (*quoniam non animo constituentis sed promittentis factum est*). (D. 13, 5, 1, 4.) In itself this declaration would not be strange, but the peculiarity of it appears when it is compared with the analogous case of formal and informal release. The formal release by stipulation (*Acceptilatio*) stood in the same relation to a simple pact of release (*pactum de non petendo*), that *fidejussio* did to the simple pact of suretyship. Now it was held that if an *acceptilatio* should fail through some formal defect, it should be construed as an agreement not to sue. (D. 2, 14, 27, 9.) A release did not require to be supported by any consideration. If, however, we suppose that a consideration was necessary to support a contract of suretyship, the different decision in the case of *fidejussio* would be explained. If a person intended to bind himself by a form that dispensed with the necessity for a consideration, and the stipulation was ineffective, he could not be bound because there happened accidentally to be a consideration. Thus an ineffective *fidejussio* was not held to be an effective *pactum de constituto*.

RIGHTS AND DUTIES.

A. Duty of Surety to Creditor.

1. To pay in default of the principal debtor. *Beneficium ordinis seu excussionis*.

The true idea of an accessory contract is that it is enforced only in default of the principal contract. If the surety is liable to pay before the principal has made default, he is scarcely a surety; he is rather a co-promiser. According to the ancient law, Justinian tells us (Nov. 4, 1), if a creditor accepted a surety he was required to proceed first against the principal debtor. If, however, the creditor failed to recover in whole or in part from the principal debtor, he could then sue the surety. A somewhat harsh straining of this rule deprived the creditor of his remedy against the surety, when the principal debtor was beyond the jurisdiction, and incapable of being sued. Papinian

seems to have helped to change the rule, and we find from the constitutions of Antoninus Pius and Diocletian and Maximian that it was not necessary to proceed against the principal debtor in the first instance, but the creditor could sue whichever he pleased, the principal or surety. (C. 8, 41, 5; C. 8, 41, 19.) Justinian, in the Novel quoted above, restored the ancient rule, freeing it, however, from its narrowness. He enacted that when both principal and surety were within the same jurisdiction, the surety should in no case be called upon to pay unless the principal debtor had been first sued, or had made default. If the principal debtor was beyond the jurisdiction, the surety could be sued, but he might petition the judge for time to produce the principal debtor. If he succeeded in producing the principal, he was meanwhile released from the suit; but if, after the time granted by the judge, he did not, he must discharge the obligation himself. (Nov. 4, 1.) Justinian afterwards introduced an exception for the convenient transaction of business, and allowed bankers (*argentarii*), at their option, to sue the surety without first suing the principal. (Nov. 136, 1.)

It was also the rule, as stated by Papinian, that when the creditor had rights *in rem* in security (*pignora, hypothecae*), he was not obliged to realise their value before suing the surety. (D. 46, 1, 51, 3; D. 46, 1, 62.) Even if the creditor sold the pledges, and was afterwards obliged to give up the price because of the eviction of the purchaser, he had his remedy against the surety. (D. 17, 1, 59, 4.) But if the agreement were that the surety should answer only for the deficiency after the sale of the pledges, he could not be sued first. (C. 8, 41, 17.)

B. Duty of Creditor to Surety. If a surety is compelled to pay the debt of the principal, the creditor must surrender to him all the rights *in rem* (*pignora, hypothecae*) that he has over property belonging to the debtor or others in respect of the debt. (C. 8, 41, 21; D. 49, 14, 45, 9.) If, however, the creditor holds those rights *in rem* in security for other debts as well, he cannot be compelled to surrender them until all the debts are discharged. (C. 8, 41, 2.)

C. Duty of Debtor to Surety.

In this respect also all are on the same footing,—that if any one pays for his principal, he can recover his money from him by the *actio mandati*. *Sponsores* have this further advantage under the *lex Publilia*, that they have an action for double the amount peculiar to themselves, and called *depensi*. (G. 3, 127.)

If the debtor pays the creditor, it is his duty to inform the surety. If he does not, and the surety also pays, he must indemnify the surety. (D. 17, 1, 29, 2.)

If the surety pays first, and does not inform the debtor, and the debtor pays, the *actio mandati* will not lie, but the debtor must cede to the surety his right to recover the money from the creditor. (D. 17, 1, 29, 3.)

INVESTITIVE FACTS.

I. A surety binds himself to answer for the debt of another. The consent or knowledge of the debtor is unnecessary. (D. 46, 1, 30; D. 13, 5, 27.)

Illustrations.

If A asserts not that he will pay B's debt on a particular day, but that B will do so, A is not bound as surety. (D. 13, 5, 5, 4; D. 46, 1, 65.)

Lucius Titius, a debtor of the Seii, died. The Seii persuaded Publius Maevius, the nephew of Titius, that he was his uncle's heir, and therefore bound to pay his uncle's debts. They procured from him a letter acknowledging that he was heir, and that he owed the money in question. Maevius was not heir. It was held that his letter did not amount to a *pactum de constituto*, because Maevius intended not to answer for another, but to answer for himself, and he himself owed nothing. (D. 13, 5, 31.)

II. Modes of constituting sureties.

Sponsio, Fidepromissio, Fidejussio.

To a *sponsor* the question is put thus—Do you undertake that the same shall be given? to a *fidepromissor*—Do you pledge your credit to the same? to a *fidejussor*—Do you become surety for the same? But we shall see what is the proper name for those to whom the question is put thus—Will you give the same? Do you promise the same? Will you do the same? (G. 3, 116.)

When Greek is used, a *fidejussor* is generally accepted by his saying, On my honour I bid you, I say it, I will do it, or I desire it. But whichever Greek word he uses for 'I say,' it makes no difference. (J. 3, 20, 7.)

A *fidejussor* may come in either before or after the obligation is entered into. (J. 3, 20, 3.)

In stipulations by *fidejussores* we must know that it is a received principle that whatever the writing bears on its face was done, must be held to have been done. It is agreed, therefore, that if a man writes himself down as *fidejussor*, all the formalities will be held to have been duly observed. (J. 3, 20, 8.)

Mandatum.—A person made himself surety by requesting another to advance money to a third party, if that other lent the money. "Lend the money at my risk" is a mandate. (D. 17, 1, 12, 13.)

Pactum de Constituto.—As the name (*pactum*) indicates, nothing more was necessary than an expression of intention.

Illustrations.

Titius wrote to Maevius as follows:—"I have written that, in terms of the mandate of Seius, I will give security, and pay without dispute whatever sum is proved to be due to you." Titius is a surety. (D. 13, 5, 5, 3.)

One wrote to a lender in these terms :—"The 10 *aurei* that Lucius Titius borrowed from you, I shall pay you with the proper interest." This is a binding contract. (D. 13, 5, 26.)

Satis tibi facio, I will give you security. This binds me.

Fiet tibi satis a me et ab illo et illo, "So-and-so and myself will give you security." Does not bind So-and-so, and binds me only in one-third.

Fiet tibi satis a me aut ab illo et illo, "So-and-so or I will give you security." Binds me to pay all.

Fiet tibi satis, Let security be given you. This binds no one. (Nov. 115, 6.)

III. Restrictions.

1. The accessory contract must be of the same nature, in some cases, as the principal.

Illustrations.

A lent 10 *aurei* to B, and C became *fidejussor* for 1000 pecks of wheat. C is not bound, because he promises wheat, while his principal (B) owes money. (D. 46, 1, 42.)

A lends 100 *aurei* to B, and C "constitutes" for grain of equal value. This is good, as *pecunia constituta* differs from *fidejussio*. (D. 13, 5, 1, 5.)

A lends money to B, and C promises to give a pledge in security. This binds C to give the pledge. (D. 13, 5, 14.)

2. The accessory contract, as a rule, must not be for more than the principal contract, but it may be for less.

[In one respect the legal position of all is the same,—that all alike, *sponsores*, *fidepromissores* and], *fidejussores*, cannot bind themselves for a debt greater than that of the principal for whom they are bound. For their obligation is [like that of the *adstipulator*] only accessory to the principal obligation; and there cannot be more in the accessory than there is in the principal. But, on the contrary, they can bind themselves for a less debt. Therefore if the principal promises ten *aurei*, the *fidejussor* may rightly bind himself for five; but not *vice versa*. Again, if the principal makes a simple promise, the *fidejussor* may promise conditionally; but not *vice versa*. And more or less must be understood to apply not only to amount but to time. For to give anything at once is to give more, but after a time less. (J. 3, 20, 5; G. 3, 126.)

This rule was construed more strictly in *fidejussio* than in *pactum de constituto*.

Illustrations.

A is bound to give B a farm. C may be surety for the delivery only of a usufruct, that being, in one sense, part of the ownership. (D. 46, 1, 70, 2.)

A owes 100 *aurei* to B. C "constitutes" for 200. C is bound only for 100. (D. 13, 5, 11, 1.)

A owes 10 *aurei* to B. C "constitutes" for the same amount and interest. The contract will not hold for the interest. (D. 13, 5, 11, 1; D. 13, 5, 24.)

A owes 10 *aurei* to B. C pledges his word (*fidejussor*) for the 10 *aurei* to be paid at Ephesus. This is bad, because C's position is harder than A's. (D. 46, 1, 16, 1.)

A owes 10 *aurei* to B. C "constitutes" to pay it at Ephesus, or on the Ides of March. This is good. (D. 13, 5, 16, 1.)

A debtor has promised to pay me; his surety (*fidejussor*) to pay me or Titius. The contract is binding, because it is easier for the surety; he has the alternative of paying Titius, and therefore a chance of being released by him. But if the debtor promises to pay me or Titius, and the surety to pay me only, the contract of the surety is more onerous. (D. 46, 1, 34.)

A promises the slave Stichus to B. C becomes surety (*fidejussor*) for Stichus or 10 *aurei*. This is bad, either because C's promise is harder than A's, or is of a different nature. (D. 46, 1, 8, 8.)

A promises Stichus or 10 *aurei* to B. C promises (by stipulation) Stichus or 10 *aurei*, whichever B shall choose. This is bad, because the principal obligation leaves the option with the promiser, the accessory with the promisee. (D. 46, 1, 8, 9.)

A promises Stichus or 10 *aurei* to B, in the option of B. C promises Stichus or 10 *aurei* (by stipulation) in his own option. He is bound, because his contract is less onerous than A's. (D. 46, 1, 8, 10.)

A promises Stichus or Pamphilus to B, in A's option. C promises the same by stipulation, in his own (C's) option. This is equally easy for C and A; but as C may choose to give Stichus, and A to give Pamphilus, there is no certainty that they will give the same object, and so the suretyship falls through, in consequence of the rule that the accessory contract must be for the same thing in *fidejussio* as in the principal contract.

3. A special restriction applicable to sureties by stipulation was introduced by the *lex Cornelia* (B. c. 81). It seems not to have applied to mandate or *pecunia constituta*.

But the benefit of the *lex Cornelia* is shared by all alike. That statute forbids the same person to bind himself for the same debtor to the same creditor in the same year for any amount of money lent exceeding twenty thousand *sestertia*. And although a *sponsor* or *fidepromissor* (or *fidejussor*) should bind himself for a greater sum, say one hundred thousand, he is condemned to pay only twenty. By money lent (*pecunia credita*) we mean not only that directly given on loan, but all that at the time the obligation is contracted is certain to become due; that is, for which the debtor has come to be bound unconditionally. And so money that we stipulate shall be paid on a fixed day, is reckoned therewith; for it is certain that it will fall due, although it is only after a time that it can be demanded. Further, the name money in that statute embraces property of every kind; if, therefore, we stipulate for wine or corn, or a slave, this statute must be observed. But there are certain cases in which the law allows unlimited suretyship—on account of dowry, for instance, or of money due you under a will, or when sureties are taken by order of a *judex*. Besides, the statute levying a duty of five per cent. on inheritances provides that to the suretyships put forth under that statute the *lex Cornelia* shall not apply. (G. 3, 124, 125.)

4. A restriction specially bearing on suretyship, although of wider extent, is derived from the *Senatus Consultum Velleianum*. In the time of Augustus and Claudius, enactments had been made preventing wives incurring obligations for their husbands. (D. 16, 1, 2, pr.) Afterwards, but not later than the time of Vespasian, the *Senatus Consultum* in question was passed in the

consulship of Marcus Silanus and Velleus Tutor. (D. 16, 1, 2, pr.)

The policy of the enactment is thus stated by Paul. Custom refuses to women not only offices of state (*publica munera*), but business duties (*civilia officia*), that is, which imply their going into the company of men, away from their own homes. It was, therefore, fit that they should be prohibited from undertaking business responsibilities and exposing their property to danger. (D. 16, 1, 1, 1.) The *Senatus Consultum*, with this object in view, was made sweeping. It forbade every woman to make any contract (D. 16, 1, 2, 4), or give any of her property as security (D. 6, 1, 39, 1; D. 6, 1, 40; D. 16, 1, 32, 1) on behalf of any person (husband, son, or father), (D. 16, 1, 2, 5), to any creditor. (D. 16, 1, 27, 1.)

Exceptions.—To this at first no exception was allowed, except where the creditor was deceived. Thus a husband pledged his wife's goods, with her knowledge. The creditor did not know that the goods belonged to the wife. She cannot plead the defence of the Act. (C. 4, 29, 5.) Justinian allowed a few other exceptions; as when a woman promised a dowry (*dow*) (C. 4, 29, 25); or when a woman became a surety for the manumission of a slave, and the slave was manumitted (C. 4, 29, 24); or when the woman received a consideration (*aliquid accipiens*) (C. 4, 29, 23); or when after two years she renewed her obligation. (C. 4, 29, 22.) But in no case was she to bind herself for her husband (Nov. 134, 8), in conformity with the general rule that gifts were prohibited between husband and wife.

An *intercessio* by a woman was treated as wholly and absolutely void.

Illustrations.

If a woman gave part of her property in pledge, and the creditor sold it to a person ignorant of the violation of the law, the woman could reclaim it after the sale. (D. 16, 1, 32, 1.)

Her heirs and sureties were no more bound than herself (C. 4, 29, 16; C. 4, 29, 20); and if as surety she paid without compulsion, she could afterwards recover it as money not due. (D. 16, 1, 8, 9.)

Intercessio includes any contract or pledge that a woman undertakes on behalf of another, whether that other person remains bound or not; in other words, whether she becomes surety (*adpromissor*), or a substitute (*expromissor*) for the debtor. (D. 16, 1, 8, 8.)

Illustrations.

A woman pays a debt due by B to C. This is not void, because it is a gift, and she does not herself become subjected to any obligation. (D. 16, 1, 4, 1.)

A, a woman, in order to release B from a debt that he owes to C, offers C, in substitution for B, her own debtor D. This also is good, because the woman does not thereby bind herself for B. (D. 16, 1, 8, 5.)

A, a mother, persuaded B, the tutor of her child C, to allow her to manage C's property, and to indemnify B gave him sureties and pledges. Here A bound herself to B, but it was not for the debt of *another*, it was for her own projects. The sureties and pledges are, therefore, good. (C. 4, 29, 6; Paul, Sent. 2. 11, 2.)

The tutor of a pupil died, leaving Titius his heir. Titius hesitated to enter on the inheritance, and so made himself responsible for the suspected maladministration of the tutor. The mother of the pupil, to induce him to enter, promised by stipulation to save him harmless. Titius entered, and was compelled to pay a sum to the pupil, which he endeavoured to recover in an action against the mother of the pupil. In this case Titius was creditor, the mother was his debtor. If she was a debtor on behalf of any one else, who was that person? Not the tutor, because he was dead. Then it could only be Titius. But how could a distinction be made between the man Titius and the heir Titius? Could the man Titius be creditor, and the heir Titius be the principal debtor, for whom the mother intervened? That seemed absurd, and accordingly Titius was entitled to the indemnity. (D. 16, 1, 19, pr.)

If in this case Titius had refused to enter, not because he suspected that the tutor had incurred liabilities, but because he doubted the solvency of the tutor's debtors, then the woman would not be bound, because she would be in effect making herself surety for the debtors of the inheritance. (D. 16, 1, 19, 4; D. 16, 1, 19, 2.)

A Praetorian died leaving two sons, one aged seven, the other his statutory tutor (*legitimus tutor*). At the request of the wife of the deceased, the mother of the pupil, the tutor entered on his father's inheritance, but did not give his authority to enable his brother also to enter. In consequence of this the pupil sustained a loss of 1000 *aurei*, which he recovered in an action against his brother. Could the brother sue the mother on her mandate? Yes, said Julian. Here, again, the liability of the mother was undertaken for her own projects, and not on behalf of any third person. (D. 16, 1, 19, 1.)

If a woman herself entered on an inheritance with the distinct object of paying the creditors of the inheritance in full, she could not defend herself under the *Senatus Consultum*. She had resolved rather to alienate her property than bind herself. (D. 16, 1, 32, pr.)

A, a woman, instead of becoming surety for C, gave B a mandate to become surety. A is thus a surety of a surety. If the creditor did not know that B had a mandate from A, he can sue B; but if he knew, he can sue neither B nor C. (D. 16, 1, 32, 3.)

A, a woman, who really intends to become surety for B to C in respect of a loan, herself borrows from C and hands over the money to B, who appears merely as her surety. If the creditor C does not know the object of the loan, he is not deprived of his remedy. (D. 16, 1, 11; D. 16, 1, 19, 5; D. 16, 1, 12.)

5. Another restraint was in the case of dowries. In A.D. 381, Gratian, Valentinian, and Theodosius introduced a rule, subsequently extended by Justinian, to the effect that neither the husband, nor his father, nor any one receiving a dowry, should be required or permitted to give any sureties for the restitution of the dowry. For, says Justinian, if the woman can intrust herself and her dowry to her husband, why should a surety be required, thus introducing an element of distrust and discord into the family? (C. 5, 20, 1; C. 5, 20, 2.)

DIVESTITIVE FACTS.

How far did the extinction of the principal obligation release the surety, or the release of the surety extinguish the obligation of the principal debtor? The answer varies to some extent with the form of contract.

1. Formal contract of suretyship (*sponsio, fidepromissio, fidejussio*).

It has been already stated that there was a distinction in the Roman Law between a formal release and an agreement not to sue (*pactum de non petendo*). (See further, Subdiv. II., Divest. Facts.) If the principal obligation were extinguished by its appropriate divestitive fact, the surety was at once released. (D. 46, 1, 60; D. 46, 1, 68, 2; Paul, Sent. 2, 17, 15.) But if the proper divestitive fact were not employed, and the creditor had informally agreed not to sue, it depended altogether on the intention of the creditor whether the surety would be released. Unless a contrary intention was indicated, an agreement not to sue the principal debtor was construed as an agreement not to sue the surety; because if the surety were obliged to pay, he could compel the debtor to indemnify him, and thus the debtor would gain nothing by the release. (D. 2, 14, 21, 5.) But if it were specially agreed that the debtor alone should not be sued, the creditor still had his remedy against the surety. (D. 2, 14, 22.)

An inconvenience of a similar character occurred to the prejudice of the creditor. When a creditor sued the principal debtor, and went so far in the proceedings as to obtain a *formula* from the Praetor, it was held that the obligation upon which the action was brought was extinguished, and that a new one was created by the *formula*. The surety was thus released, even if the creditor, after obtaining judgment, failed to recover his money from the debtor. Justinian altered this rule, and allowed the creditor, in the case stated, to sue the surety, and recover from him the balance of the debt. (C. 8, 41, 28.)

2. Mandate. When suretyship was contracted by mandate, the technical difficulty arising from the forms of extinguishing obligations did not exist.

Illustration.

Titius requests Gaius to give a loan to Maevius of 100 aurei. Gaius advances the money. Gaius afterwards sues Maevius and recovers 50 aurei. Can he sue Titius for the balance? That he should be able to do so is the very essence and object of

the contract. Nothing relieves Titius except the repayment of the whole 100 aurei by Maevius. (D. 17, 1, 27, 5.)

3. *Constitutum*.—When one person agreed to answer for another, that other remained bound. (D. 13, 5, 28.) If the surety (*qui constituit*) were sued, it was held that the principal was not released except to the extent to which the debt was actually paid. We are at the same time told that anciently it was a moot point whether the action against the surety took away the obligation of the principal debtor. (D. 13, 5, 18, 3.)

REMEDIES.

A. By Creditor against Surety. If the suretyship were formal, the surety was sued upon his stipulation; if by mandate, then by the *actio mandati*; and if by *constitutum*, by the *actio de pecunia constituta*.

1. Generally, what would be a defence if the principal debtor were sued, was a defence for the surety.

The *exceptiones*, moreover, by which the debtor defends himself, are for the most part usually allowed to his *fidejussores* too. And rightly; for what is demanded from them is demanded from the debtor himself, seeing he may be forced by an *actio mandati* to give them back what they have paid for him. If, therefore, a creditor agrees with his debtor not to demand the money, it is held that to the aid of the *exceptio pacti conventi* those too may have recourse that are bound for the debtor, just as if the agreement had been made with them that the money should not be demanded from them. Some *exceptiones*, however, assuredly, are not usually allowed them. For example, if a debtor yields up all his goods, and his creditor thereafter takes proceedings against him, he defends himself by the *exceptio NISI BONIS CESSERIT*. But this *exceptio* is not granted to *fidejussores*; simply because the creditor in binding others for the debtor has this chiefly in view, that after the debtor fails and loses all his means, he may be able to obtain from those that he has bound for the debtor what is his. (J. 4, 14, 4.)

2. [Moreover, the heir of a *sponsor* or *fidepromissor* is not bound, unless we are asking about an alien *fidepromissor* in whose State another law is in use.] But not only is the *fidejussor* himself under obligation; he leaves his heir bound too. (J. 3, 20, 2; G. 3, 120.)

In *mandatum* and *constitutum* the heir of the surety also is bound. (D. 13, 5, 18, 2; C. 4, 18, 1.)

3. *Prescription*.

Again, a *sponsor* and a *fidepromissor* are, by the *lex Furia*, freed after two years. (G. 3, 121.)

Until the change effected by Justinian, the *actio de constituta pecunia* could not be brought after a year. (C. 4, 18, 2, pr.)

B. By Surety against the Principal Debtor.

1. For *sponsors* the *lex Publilia* allowed the *actio depensi* for double the sum paid. (G. 3, 127.)

2. If a *fidejussor* has paid anything for a debtor, he has, to recover it, an *actio mandati* against him. (J. 3, 20, 6.)

This applies also to *fidepromissores* and *sponsores*, and to *constitutum*.

3. In Mandate. The *mandator* must procure a transfer from the creditor (*mandatarius*) of his action against the principal debtor; and thus the *mandator* can sue as the agent of the creditor (*procurator in rem suam*). (D. 46, 1, 41, 1.)

Second Case—CO-SURETIES.

RIGHTS AND DUTIES.

A. In the case of *Sponsores* and *Fidepromissores*.

I. Duty of each surety to the creditor.

When several persons became sureties for the same debt, each was liable to pay the whole (*in solidum obligatur*). But for Italy, in B.C. 95, the *lex Furia* provided an awkward remedy.

When the money can be demanded, the obligation is divided into as many parts as there are *sponsores* or *fidepromissores* at the time, and each is ordered to pay his share. (G. 3, 121.)

This was an effectual protection to the surety, but at the cost of diminishing the security of the debtor; and as the security of the debtor was the sole purpose of the suretyship, the *lex Furia* was not a success.

II. Duty of surety to his co-sureties.

When one surety paid, were the others bound to contribute? In Italy, after the *lex Furia*, this point could not arise, because no surety was bound to pay more than his own fraction of the debt; but in Italy, before that statute, and in the provinces afterwards, the necessity for contribution existed.

Besides, the *lex Apuleia* brought in a kind of partnership between *sponsores* and *fidepromissores*. For if any one of them pays more than his share, for the excess he has an action against the rest under that statute. It was passed before the *lex Furia*, at a time when they were bound each for the whole amount. Hence it is questioned whether after the *lex Furia* the benefit of the *lex Apuleia* still remains. Beyond the bounds of Italy it does; for the *lex Furia* holds good in Italy only, but the *lex Apuleia* in the other regions beyond. (G. 3, 122.)

III. Duty of the debtor to the surety.

Besides, the *lex Pompeia* provided that a creditor on receiving *sponsores* or *fidepromissores* should first state and declare openly both the amount to be assured and the number of *sponsores* or *fidepromissores* he is to receive as undertaking that obligation. Unless he first states this, the *sponsores* or *fidepromissores* are allowed to demand within thirty days a preliminary trial of the question whether such a statement was first made in accordance with that statute. And if it is decided that it was not made, they are freed. (G. 3, 123.)

B. *Fidejussores, Mandatores, Qui constituunt.*

I. Duty of surety to creditor. Until the time of Hadrian, the creditor could require any one co-surety to pay the whole debt. The only remedy of the surety was to require the creditor, *before* paying him, to transfer his rights of action against the other sureties. (D. 46, 3, 76; D. 46, 1, 41, 1.) If this were done, the surety could, in the name of the creditor, sue the co-sureties, and compel them to share the loss.

1. *Beneficium cedendarum actionum.*

We have already seen that the creditor must surrender to a surety, on paying the principal debt, all his rights against the principal, as also all mortgages. (D. 46, 1, 13; C. 8, 41, 21.) The creditor must equally surrender his action against the co-sureties. But here a difficulty arises. The debt for which the sureties are liable is *one* debt, and according to the general rule, an obligation *in solidum* was extinguished if only one of the co-debtors paid it. When, therefore, a surety was compelled to pay, was not the right of the creditor against the other parties destroyed? If so, how could he assign to the surety against his co-sureties a right that, *ex hypothesi*, was annihilated? This technical difficulty was got over by a technical subtlety. It was held that another interpretation might be put upon the transaction. It might be said that the creditor did not ask the surety to discharge the obligation, but rather to buy his (the creditor's) right against the co-sureties. For this view it was urged that the creditor could not require the surety to pay without surrender. (D. 46, 1, 36.) This view was not without its influence on practice. The transfer of the action must take place before the payment, otherwise the obligation was extinguished. (D. 46, 3, 76.)

But if the creditor by his own fault was not in a position to transfer his right of action against the co-sureties, could he then compel one surety to pay the whole? Papinian answered the question in the negative. (D. 46, 3, 95, 11.) But a case stated by Julian seems at variance with this opinion.

Two persons (A and B) were co-sureties for 20 *aurei*. C, the creditor, accepted 5 *aurei* from A, and agreed not to sue him. Could he afterwards recover the remaining 15 from B? or would he be repelled by the plea of fraudulent acquittal of the co-surety? Julian said he would not. (D. 46, 1, 15, 1.)

2. *Beneficium Divisionis*, in favour of *fidejussores, mandatores*, and *qui constituunt*. (C. 4, 18, 3.)

Fidejussores [are bound for ever, and] if more than one, no matter what

their number, are liable each for the whole, and the creditor is free to demand the whole from whom he will. But by a letter of the late Emperor Hadrian the creditor is forced to demand only a fair share from each *fidejussor* that is solvent at the time issue is joined (*litis contestatio*), and therefore, if any of them is at that time insolvent, this increases the burden of the rest. [In this respect, then, this letter differs from the *lex Furia*, that if any of the *sponsores* or *fidepromissores* is insolvent, more cannot, for this reason, be demanded from the rest. But since the *lex Furia* applies to Italy only, it follows that in the provinces *sponsores* also, and *fidepromissores*, just like *fidejussores*, would be bound for ever, and each for the whole amount, were it not for the letter of the late Emperor Hadrian, which seems to give relief to them also. But the position of *fidejussores* is different, for to them the *lex Apuleia* does not apply.] If, therefore, the creditor obtains the whole amount from one, that one alone will bear the loss, if (that is) his principal is insolvent. But he has himself to blame; for as appears from what is said above, if the creditor demands the whole from any one, he may, under the letter of the late Emperor Hadrian, desire that an action be given against him for his fair share only. (J. 3, 20, 4; G. 3, 121-122.)

The form of defence was, "*Si non et illi solvendo sint.*" (D. 46, 1, 28; D. 46, 1, 26; D. 46, 1, 10.)

When two debtors (*correi*) separately gave *fidejussores*, the creditor could not be forced to divide his claim among all, but only among those that were bound for the same debtor. (D. 46, 1, 51, 2.)

A surety of a surety cannot require division between them, because his surety is in the situation of a principal debtor. (D. 46, 1, 27, 4.)

If the sureties contract a joint and several obligation (*in solidum et partes viriles*), each is bound for the whole debt; but if the contract is joint or several (*in solidum aut partem virilem*), each binds himself only for a share. (D. 46, 1, 51, pr.)

II. Duty of debtor to surety.

In that statute [*lex Pompeia*] no mention of *fidejussores* is made. But it is usual, in accepting them also, to first make such a statement. (G. 3, 123.)

SUBDIVISION II.

RULES APPLICABLE TO CONTRACTS GENERALLY.

RIGHTS AND DUTIES.

UNDER this head little has to be added. The several duties arising from the several contracts will be found in the exposition of those contracts; and there remain only a very few general remarks.

1. Interpretation of Rights and Duties.

To the man that is understood to claim too much in respect of place, he comes very near that claims more than he has any ground (*causa*) for

claiming. A man may, for instance, have stipulated with you thus : " Do you undertake to give me the slave Stichus or ten *aurei* ? " and then claim either the one or the other—the slave alone, or the ten *aurei* alone, for instance. He therefore is understood to claim too much ; because in that sort of stipulation the promiser is allowed to elect whether he prefers to pay the money or give the slave. If, then, the claimant sets forth in his *intentio* that the money only, or the slave only, ought to be given him, he snatches from his adversary this right of election, and in that way makes his own condition better, but his adversary's worse. In that case, therefore, a special form of action is set forth, in which the claimant states in his *intentio* that the slave Stichus or ten *aurei* ought to be given him, so that he claims in the same way in which he stipulated. (J. 4, 6, 33 D.)

For the meaning of "*intentio*," see Book IV., *Proceedings in Jure*.

Illustrations.

Gaius has promised to Titius, by stipulation, Stichus or 10 *aurei*. Gaius may change his mind as often as he pleases until he actually gives one of the two. (D. 45, 1, 138, 1.)

Titius has several farms called "Cornelian." Gaius stipulates for his "Cornelian" farm without saying which. Titius has the option of giving any of his "Cornelian" farms, whichever he pleases. (D. 45, 1, 106.)

Titius sold a house to Gaius, reserving to himself the right of habitation (*habitatio*) during his life, or 10 *aurei* a-year. Gaius, exercising his option for the first year, paid 10 *aurei*, but the second year desired to give Titius the possession (*habitatio*). Gaius was safe against an action at the instance of Titius so long as in any year he either paid the rent or offered him the alternative of dwelling in the house. (D. 19, 1, 21, 6.)

Titius has stipulated for 10 or 5 *aurei* ; 5 only are due. (D. 45, 1, 12.)

Titius has stipulated for a thing to be given him on the kalends of January or February. The thing is due only in February. (D. 45, 1, 109.)

Titius has stipulated for Stichus or 10 *aurei*, "whichever," he said, "I please." Titius can sue for either in his option. (D. 45, 1, 75, 8.)

2. Genus and species.

Again, if one stipulates for a slave in general, and demands Stichus specially, or stipulates for wine in general and demands Campanian wine specially, or for purple in general and demands Tyrian purple specially ; then he is understood to claim too much. For he takes away from his adversary his free choice, secured him by the stipulation of paying something else than what was demanded. (J. 4, 6, 33 D.)

3. Quality.

If no special quality of an article is promised, any quality may be given in performance. (D. 17, 1, 52.) In the contract of *mutuum*, the same quality must be returned that is lent. (D. 12, 1, 3.)

INVESTITIVE FACTS.

Hitherto we have dealt with the investitive facts peculiar to each separate contract ; we have now to consider in what points

all contracts agree. This discussion will fall under the following divisions :—

- I. CONSENT—ERROR.
- II. MODALITY, the modification of an agreement by time, place, or condition.
- III. RESTRICTIONS ON THE INVESTITIVE FACTS.
 - I. In respect of their origin : Force, Fraud, and Bad Consideration.
Vis, Dolus, injusta causa.
 - II. In respect of the object of the promise. Illegal contracts.
 - III. In respect of the persons incapable of entering into contracts.
- IV. EXTENSION OF INVESTITIVE FACTS. AGENCY.

First, CONSENT—ERROR.

Two or more persons are said to consent when they agree upon the same thing in the same sense.¹ All contracts imply consent. (D. 44, 7, 3, 1.) In order to establish a promise, a proposal must be accepted in the same sense in which it is made. This is the meaning and essence of contract ; for, as has been pointed out, the obligation from contract is enforced by law, in accordance with the intention of the parties.

Intention, however, is a mental act, and can be discovered only through the medium of language. This medium is a source of error. Such error may be of two kinds, essential and non-essential.

1. ESSENTIAL ERROR (*error in corpore*).—An error is essential when it is such as prevents the two contracting parties agreeing upon the same thing in the same sense. Such an error is inconsistent with the nature of the consent that is of the essence of contract. It is in this sense that error is said to vitiate consent.² Essential error may occur in any one of three forms. A may promise a thing to B, B meaning to accept a different thing ; or they may agree on the thing, but A may undertake one kind of duty, and B understand another ; or, finally, A may intend to bind himself to B, and discover that he has really promised to C. In technical language, the error may be in the *corpus*, or thing promised, or in the nature of the obligation, or in the person of the promisee.

If the stipulator is thinking of one thing, the promiser of another, no obligation is contracted, any more than if no answer had been given to the question. An example would be, if any one were to stipulate with you for the slave Stichus, and you were thinking of Pamphilus, whose name you believed to be Stichus. (J. 3, 19, 23.)

¹ *Et est pactio duorum pluriumve in idem placitum consensus.* (D. 2, 14, 1, 2.)

² *Nulla enim voluntas errantis est.* (D. 39, 3, 20.)

Non videntur qui errant consentire. (D. 50, 17, 116, 2.)

Illustrations.

Titius sells to Gaius for 100 *aurei* the *fundus Sempronianus*. That is the correct name; but Gaius, being in error as to the name, intended to buy quite a different farm. There is no contract of sale, because what the one intends to sell the other does not intend to buy (*quia in corpore dissensimus*). (D. 18, 1, 9, pr.) But if both mean the same farm, although they know it by different names, the contract is good. A mistake in the name is nothing if there is an agreement as to the thing.¹

Titius lets a farm to Gaius at a rent of 10 *aurei*. Gaius understood the rent to be 5 *aurei*. There is no contract. But if the mistake were the other way, and Titius was disposed to let it for 5, then the contract is good, and the rent is 5 *aurei*. (D. 19, 2, 52.)

Maevius agreed to let a farm to Sempronius for forty years. Sempronius, misunderstanding the terms offered, agreed to buy it. There is no contract, because one has in view the duties belonging to sale, the other those belonging to letting on hire. (D. 44, 7, 57.)

Maevius deposited with Sempronius a bag of money for safe custody. Sempronius thought it was a loan, and used the money. This is not a contract either of *depositum* or *mutuum*. Sempronius may, however, be compelled to restore the money. (D. 12, 1, 18, 1.)

Maevius, intending to make a present to Sempronius, gave him money which the latter accepted as a loan. Was this a gift or a loan? Julian answered it was neither, because the parties intended different things. Is Sempronius bound to restore the money? Certainly; but if he has spent the money he can resist the claim of Maevius to restitution, on the ground that such a demand, after he intended to make a gift, is against good conscience (*exceptio doli mali*). Another point is suggested by this case, which, although not belonging to the law of contract, may be mentioned here. What is the effect of such an error upon the ownership? Julian says (D. 41, 1, 36) that an error as to the *causa* does not vitiate the delivery (*traditio*) as a transvestitive fact of ownership. Hence, in this case, Sempronius would be owner, and the remedy of Maevius is therefore not by *vindicatio*, but by *condictio*. (D. 12, 1, 18, pr.)

Julius agrees to advance money on loan to Cornelius, a respectable man. Gaius brings to Julius another Cornelius, a needy fellow, and induces Julius to pay him the amount. There is no loan; and both Gaius and the false Cornelius are guilty of theft, because their conduct is fraudulent. (D. 47, 2, 52, 21; D. 47, 2, 66, 4.)

Julius asked a loan from Titius and Cornelius. Cornelius gave an order to Seius, his debtor, to pay the amount to Julius. Seius then, by stipulation, promises to give Julius the loan, under the belief, however, that he (Seius) was the debtor of Titius. Does a contract of loan subsist between Seius and Cornelius, the real creditor? No, says Celsus, for Seius intended to bind himself to Titius, not to Cornelius; but since Seius has got the money of Cornelius, he is bound in good conscience to return it to him. (D. 12, 1, 32.) In this case the promise of Seius was considered to bring Julius into connection with Titius, so that when the money was paid it was the same as if it had first been given to Titius, and by him to Julius. But this fiction was inadmissible in favour of Cornelius, who never entered into the consideration of Julius.

2. NON-ESSENTIAL ERROR (*error in substantia* or *materia*) exists when the parties agree upon the same thing, in the same sense, but one has, unknown to the other, a wrong belief as to the

¹ *Nihil enim facit error nominis, cum de corpore constat.* (D. 18, 1, 9, 1.)

nature of that thing. For example, a shopkeeper agrees to sell a vase to a purchaser, who imagines it to be made of gold; the shopkeeper knows it is not, but is ignorant of the delusion of his customer. In this instance the shopkeeper is free from blame, and has made a fair bargain; all the essentials of a contract are present. But it would be hard if the customer should be compelled to take what he would never have bought but for an erroneous belief as to its composition. How far in such cases should the law give relief? On the one side, the disposition of the jurists was to support transactions; on the other, it was a great hardship to force upon a buyer a different kind of article from what he intended to buy. Savigny, who has gone through the cases, sums up those in which relief was granted under this general statement:—

When the difference in quality between the thing bought and that which the purchaser intended to buy is such as to put the one in a different category of merchandise from the other, then the error is fatal to the contract.

(1.) A person agrees to take an article believing it to be gold, when in reality it is bronze. The sale is void. This result was not reached without controversy. Marcellus adhered to the hard line, that if the parties agreed as to the particular thing sold (*i.e.* as to the *corpus*), and there was only an error as to its quality (*in materia*), the contract was good. Ulpian, however, differed from him, when the difference was between gold and bronze. (D. 18, 1, 9, 2.)¹ If, however, the article were of gold, but of inferior quality, the contract was good. (D. 18, 1, 10.) In another case co-heirs sold a braclet said to be of gold to one of themselves. It was found to consist chiefly of bronze. The contract was supported because the thing was partly of gold. (D. 18, 1, 14.)

(2.) A person takes an article that he thinks is silver; it is really tin or lead. The sale is void. (D. 18, 1, 9, 2.)

You have sold me, without intending to deceive me, a table covered only with silver, which I thought to be solid. The sale is void. (D. 18, 1, 41, 1.) But Ulpian seems to decide the other way, in the analogous case of a thing being gilt with gold. (D. 18, 1, 14.)

(3.) A person buys wine, as he thinks, but it is vinegar. The sale is void. Here, however, Ulpian draws a distinction. If the thing sold was wine, and became vinegar only when sour, the sale is good; but if it was vinegar from the first, then there is such a difference between the things that the error vitiates the contract. (D. 18, 1, 9, 2.)

(4.) A person buys a slave of one sex thinking the slave to be of the other sex. The sale is void. If, however, the error were in buying a female slave as a virgin, who was not, the mistake did not vitiate the contract. (D. 18, 1, 11, 1.) Why? Savigny urges that in this, as in the three preceding cases, male and female slaves belonged to a different sort of merchandise. Female slaves were employed in house-

¹ Marcian seems to take a different view. (D. 18, 1, 45.) He says a sale of brass for gold is valid, but the seller is bound to give the article in gold. Savigny thinks this was the ancient rule, but superseded by the opinion of Ulpian.

work, male slaves in work out of doors ; a difference as great as separates the silver-smiths from coppersmiths or iron-workers.

There are passages that seem to carry relief in cases of error further, but Savigny is not disposed so to construe them.

1°. The mistake of old clothes for new. According to the rule laid down by Savigny, this error does not relate to two different kinds of merchandise, and therefore should not be fatal. An extract from Marcian (D. 18, 1, 45) is not easily to be reconciled with this view. Marcian quotes the opinions of Labeo, Trebatius, Pomponius, and Julian, to the effect that when old clothes furbished up for new are sold (*si vestimenta interpola quis pro novis emerit*), the vendor must make good the difference in value. Savigny says in this case the vendor must be understood to have warranted the clothes as new. But there is nothing about warranty in the text ; nor can it be easily supposed that Marcian had in his view a case of warranty. If he had, his proposition was to a Roman lawyer self-evident, and the array of opinion he quotes would seem superfluous. The distinction between this case and the others seems to be that the contract for the sale of the clothes was valid, but that the vendor must indemnify the buyer.

2°. Paul (D. 19, 1, 21, 2) qualifies his opinion that an error as to the *corpus* alone is fatal, not a mistake as to the quality, by the important exception that the vendor, even if he is innocent, ought to make good to the buyer the difference of price between what the buyer actually gave, and what he would have given if he had known the real nature of the article ; as, *e.g.*, when he buys tables as made of citron, when they are not. Here again Savigny says the vendor must have sold them for citron tables ; but it may be doubted whether with sufficient reason.

3°. Error in formal contract. Titius stipulated with Gaius for a thing that he thought was of gold, but was only brass. Gaius is bound to deliver the thing agreed upon without any indemnity, unless he cheated Titius, after having given an express promise not to cheat (*doli mali clausula*). (D. 45, 1, 22.) The reason assigned is that the parties agreed on the object of the stipulation (*quoniam in corpore consensimus*).

Second—MODALITY.

The term "Modality" is used to signify that a promise is limited as to the time or place of performance, or is suspended by a condition.

A. PLACE.

In the absence of any express agreement as to the place where the contract is to be performed, the place is often indicated by the nature of the promise. A promise to deliver an immoveable must be performed where the immoveable is ; so a promise to repair a house must be performed where the house is. But if there is no such indication, generally the creditor can demand performance where he can sue, *i.e.* within the jurisdiction to which the defender is subject. This rule is subject to an important qualification in the case of *bonae fidei* contracts. The defendant is not obliged to carry a moveable from the place where it happens to be at the time he is bound to deliver it, except at the risk and cost of the plaintiff. If, however, the defendant has caused the moveable to be kept purposely in an

inconvenient place, he is not entitled to this indulgence. (D. 16, 3, 12, 1.) It is otherwise, however, in a stipulation (a contract *stricti juris*). When no place is mentioned in a stipulation, the promiser must deliver the thing to the stipulator within the jurisdiction to which the promiser is subject. (D. 45, 1, 137, 4.)

So much as to the place in which the plaintiff could exact performance. Where could the debtor require the creditor to accept performance? There is no text quite applicable to this; but Savigny thinks that a complete reciprocity must be admitted between the two parties, and that the debtor would have a freedom of choice corresponding to that enjoyed by the creditor.

Too much may be claimed in respect of place,—as when a man has stipulated that something shall be given him in a certain place, and then claims it in another place, without making mention of the place in which he stipulated it should be given him. A man may, for instance, have stipulated thus, “Do you undertake to give it me at Ephesus?” and then at Rome bring a simple *intentio* that it ought to be given him. The reason why he is understood to claim too much is this, that by bringing a simple *intentio* he deprives the promiser of the advantage he had if he paid at Ephesus. When, therefore, a claim is made elsewhere, an *actio arbitraria* is given to the claimant, in which account is taken of the advantage that would have been open to the promiser if he paid at that place. It is in trade that the greatest advantage is commonly found—in wine, oil, corn, for instance, which bear a different price in every single district; but money, too, is not let out at the same interest in every district. If, however, the claim is made at Ephesus, that is in the place where he stipulated the thing should be given him, then he rightly proceeds by a simple action. And that is pointed out too by the Praetor, because the promiser secures his advantage in making payment. (J. 4, 6, 33 C.)

The action here referred to is called *actio de eo quod certo loco*. (D. 13, 4, 3.) The sphere of its operation was narrow. In all contracts, except stipulation (D. 13, 4, 7, 1; D. 13, 4, 2, 1), *mutuum* (D. 13, 4, 6), and *expensilatio*, an action could be brought elsewhere than in the place of performance, the judge taking account of the circumstance. (D. 13, 4, 7, pr.) Even in the case of stipulation it was only where the promise was to give (*dare*), not to do (*facere*), that recourse was necessary to the *arbitraria actio*. (D. 5, 1, 4, 3.)

Titius has stipulated for 100 *aurei* from Gaius, to be paid at Capua, and Maevius is surety. Owing to the fault of Gaius the money is not paid at Capua. Can Maevius be sued at Rome? Maevius is not excused, and must pay as if he had made default himself. (D. 13, 4, 8.)

The judge had power even to increase the amount sued for, if it was the interest of the plaintiff that the money should be paid elsewhere than at the place where the action was brought. (D. 13, 4, 2, 8.) On the other hand, he could acquit the defendant if the latter preferred to pay at the place agreed upon, and give proper securities. (D. 13, 4, 4, 1.)

B. TIME.

I. If no time is mentioned in the contract, performance could

be immediately demanded. (D. 45, 1, 60; D. 45, 1, 41, 1; D. 50, 17, 14.) But a reasonable time, varying with the nature of the contract, must be allowed for performance.

If you stipulate that a farm shall be given you, or a slave, you will not be able to bring an action forthwith, unless a sufficient space of time for delivery has elapsed. (J. 3, 19, 27.)

Places too are usually inserted in a stipulation, as "Do you undertake to give it at Carthage?" This stipulation, though it seems to be made simply, yet in truth has a time thrown in for the promiser to use in giving the money at Carthage. Therefore, if a man stipulates thus at Rome, "Do you undertake to give it at Carthage to-day?" the stipulation will be void, because the promise in return is impossible. (J. 3, 15, 5.)

Again, time must be allowed when slaves not born are sold, or growing crop, or a contract is made for building a house. (D. 45, 1, 73, pr.)

What is a reasonable time? Suppose Titius, being at Rome, agrees to pay to Gaius, also dwelling there, 100 *aurei* at Ephesus, how long time is allowed to Gaius for the payment? It is a question for the judge, who will consider how long a prudent and fairly active man would take for the distance. On the one hand, Gaius is not to be required to go through storm and tempest, and to travel by night and day; nor, on the other hand, is he to dawdle on the way, but to make such progress as, having regard to his age, and state of health, and the season of the year, might fairly be expected. If, however, he actually goes to Ephesus, the money is due from the moment of his arrival, although he has made a quicker than average journey. (D. 45, 1, 137, 2.)

So in the case of a building, the builder must be allowed the time required by an ordinary builder (D. 45, 1, 137, 3); and if any accident occurs to cause delay, as fire, allowance must be made, and a longer time granted. (D. 45, 1, 15.)

A difference of opinion emerges in the Digest on the question at what time a breach of such a contract occurs. Suppose a building could be put up in two years, and one year has elapsed without a beginning having been made, cannot the builder be sued, since it is now impossible that the contract should be performed within the time, or must the plaintiff wait until the last day of the two years has expired?

Ulpian states that, in the case of a contract to repair, the owner of the house is not obliged to wait until it falls down; nor, in a contract to build, until a sufficient time has elapsed to complete the building; but he may sue if there is unreasonable delay. (D. 45, 1, 72, 2.) Papinian, Pomponius, Celsus, and Marcellus are of a contrary opinion, and state that when time is allowed, there is no breach of contract until the time has expired. (D. 45, 1, 124; D. 45, 1, 14; D. 45, 1, 98, 1; D. 45, 1, 72, 2.)

II. When a time for performance is mentioned in the contract.

Every stipulation is made either simply, or for a certain day, or conditionally. It may be made simply, as when the question is, "Do you undertake to give five *aurei*?" and that can be claimed instantly. It may be made for a certain day, when a day is thrown in on which the money is to be paid, as "Do you undertake to give ten *aurei* on the first kalends of March?" But what we stipulate for against a certain day, though due at once, cannot be claimed before the day comes; and not even on that very day for which the stipulation is made can it be claimed, because the whole of that day

ought to be allowed the debtor for payment at his discretion. Indeed it is not certain that the money has not been given on that day for which it was promised, before the day is gone. (J. 3, 15, 2.)

A man that has stipulated that a thing shall be given him this year or this month, cannot rightly claim until every part of the month or year is gone by. (J. 3, 19, 26.)

C. CONDITIONS.

I. *Definition*.—A CONDITION exists when the performance of a promise is made to depend upon an event future and uncertain. (D. 12, 1, 39 ; D. 45, 1, 100.)

Conditions referring to past or present time, either make the obligation invalid at once or do not put it off at all.

If, for instance, one runs, "Do you undertake to give it if Titius was consul, or if Maevius is alive?" and neither of those is so, the stipulation is not valid ; but if they are so, it is valid at once. For what in the very nature of things is certain is no hindrance to an obligation, though to us it is uncertain. (J. 3, 15, 6.)

Dies is when a time is agreed upon for the performance of a promise. It is either *ex die*, when performance cannot be demanded before a certain day ; or *in diem*, when performance cannot be demanded after a certain day. (D. 44, 7, 44, 1.)

Do you promise to give on the kalends of March ?—is *ex die*.

Do you promise to pay up to the kalends of March ?—is *in diem*.

Dies is definite when a specific day is named ; it is indefinite (*incertus dies*) when it is certain that the day will come, but not when it will come. (See Book III., Conditions in Wills.)

Incertus dies differs from *conditio*. When an *incertus dies* is mentioned, it is certain that the promise will be due, but not when it will be due. When a promise depends on a *conditio*, it is not certain that it ever will be due.

The Romans used certain terms with respect to deferred promises. A notable distinction was between *dies cedit* and *dies venit*.

When an obligation begins to exist, as when money becomes due, it was said, *dies cedit* : when performance may be demanded, it was said, *dies venit*.

In a simple unconditional contract, both *dies cedit* and *dies venit* the moment the contract is made.

When there is no condition, but a time is fixed for performance, the obligation at once exists (*dies cedit*), but performance cannot be exacted until the time arrives (*dies venit*).

If the contract is conditional, and no time specified, no obligation exists until the condition is fulfilled ; and then performance may be at once demanded. (Both *dies cedit* and *dies venit*.)

If the contract is conditional, and also a time is fixed for

performance, the obligation exists (*dies cedit*) when the condition is fulfilled; but performance cannot be demanded (*dies non venit*) until the time arrives.

The distinction between *dies cedit* and *dies venit* is of little practical importance in the law of Contract; but it is a vital one in the law of Wills.

When a man makes a stipulation conditionally, although he dies before the condition is fulfilled, yet afterwards, when the condition exists, his heir can bring the action. And so too on the side of the promiser. (J. 3, 19, 25.)

A conditional stipulation gives rise to a hope only that there will be a debt: and that hope we transmit if before the condition exists death befalls us. (J. 3, 15, 4.)

But in a conditional legacy, if the legatee died before the condition was fulfilled, he transmitted nothing to his heirs. The reasons for this distinction will be afterwards examined.

The chief practical effect of a condition in a contract was, that if the promiser paid before the condition was fulfilled, he could recover his money as "not due" by the *condictio indebiti*. (D. 45, 1, 38, 16.) But for many purposes a conditional obligation was regarded as subsisting before the condition was fulfilled. Thus a pledge might be given to secure a conditional obligation. (D. 20, 1, 13, 5.) Again, the capacity of the promiser was reckoned from the time of making the contract, not from the fulfilment of the condition: a slave could not make a contract to take effect after he was free. (D. 45, 3, 26.) Moreover, when a condition was fulfilled, it had a retroactive effect, and the obligation was held to subsist from the moment the contract was made. This was important, as we have seen (p. 269) in questions of priority in mortgage. (D. 20, 4, 11, 1.)

Illustrations.

A stipulation is made conditionally when the obligation is put off and made to depend on some event, so that if anything is done or not done the stipulation begins to be binding. For instance, "Do you undertake to give 5 *aurei* if Titius has been made consul?" (J. 3, 15, 4.)

Titius stipulates with Gaius for 10 *aurei* on demand. This is not a condition, but an admonition to the debtor to be prompt in payment. Hence if the creditor dies without making a demand, his heir is nevertheless entitled to the money. (D. 45, 1, 48.; D. 45, 1, 135, 1.)

A farm was mortgaged. Titius bought it from the owner on condition that the latter should release it from the mortgage before the kalends of June. Can Titius sue the owner to compel him to release the farm and deliver it? It depends on the intention of the parties. If Titius is right in his demand, the sale was not conditional; if the sale was really conditional, the owner may fulfil it or not as he pleases. (D. 18, 1, 41.)

If a man stipulates thus, "Do you undertake to give 5 *aurei* if I do not go up into the Capitol?" it will be just the same as if he had stipulated that they should be given him at death. (J. 3, 15, 4.)

When no time was fixed, as in the case stated by Justinian, Papinian tells us there was a controversy. Thus, "If you do not deliver Pamphilus, do you promise 100 *aurei*?" Pegasus said no action could be brought until it had become impossible to deliver Pamphilus. Sabinus took the opposite view, and construed the condition as if it were stated thus:—"Do you promise to deliver Pamphilus, and, if you do not, to pay 100 *aurei*?" (D. 45, 2, 115, 2.)

A negative condition was usually rendered definite by adding a time—as, if you do not go to the Capitol within two years. (D. 45, 1, 27, 1.)

If Lucius Titius does not arrive in Italy before the kalends of May, will you promise me 10 *aurei*? In this case no action can be brought until (1), the kalends of May, and (2) the non-arrival of Titius in Italy. (D. 45, 1, 10.)

"If you do not go up to the Capitol or go to Alexandria, do you promise 100 *aurei*?" Papinian says in this case no action can be brought until it is certain that you cannot do one of the two things. (D. 45, 1, 115, 1.)

II. Conditions may be attached to all contracts except the *expensilatio*.

A mandate can be given either for a future day or conditionally. (J. 3, 26, 12.)

The contract of sale can be made either conditionally or simply. A case of the former is this—"If Stichus up to a certain day gives you satisfaction, you shall buy him for so many *aurei*." (J. 3, 23, 4.)

A condition was usually inserted in the contract at the time of making it. But conditions, subsequently agreed upon, could be used by way of defence. Thus if the creditor after making a contract agreed not to sue unless a certain event occurred, and he sued before that event occurred, he would be defeated by the *exceptio pacti conventi*. So if, after the contract, the creditor agreed that the debtor should be released if a certain event happened, and that event did happen, the creditor would be defeated if he endeavoured to recover the money. (D. 44, 7, 44, 2.)

III. FULFILMENT OF CONDITIONS.—A condition is said to be fulfilled (*stipulatio committitur*) either when the event occurs, or when the promiser prevents its occurrence. (D. 45, 1, 85, 7; D. 50, 17, 174.)

Illustrations.

Gaius has promised to Maevius 10 *aurei* if Titius becomes Consul. Gaius dies, and afterwards Titius becomes Consul. The heirs of Gaius must pay the 10 *aurei* to Maevius. (D. 45, 1, 57.)

Seia, in writing to Lucius Titius, stated that she had bought gardens at his request; and that she would convey the property to him as soon as she was paid the price with interest; and Lucius Titius agreed to pay the money and take over the gardens before

the kalends of April. He failed to pay the whole of the money by that day, but shortly afterwards tendered the whole. Seia refused. Could he compel her to take the money and deliver up the gardens, although the time had passed within which, in strictness, the condition could be fulfilled? The judge had power to allow him a little time, if it entailed no inconvenience on Seia. (D. 45, 1, 135, 2.)

Titius sold a library to Gaius on condition that the *Decuriones* of Campanus gave him a site for it. Gaius never applied for a site. Could Titius compel him to carry out the sale, as if the condition had been fulfilled? Certainly, when it was the fault of Gaius that a site was not obtained. (D. 18, 1, 50.)

IV. SUSPENSIVE AND RESOLUTIVE CONDITIONS.—A condition suspends an “investitive fact.” But some conditions do not exactly bear that character; they are rather divestitive facts than limitations of investitive facts. They are called *resolutive conditions*, as opposed to the other conditions that really suspend investitive facts, and are called *suspensive conditions*. This distinction, although not the terminology, was known to the Roman jurists. “Whether the purchase is unconditional, but is rescinded subject to a condition, or whether the purchase is rather conditional?” is a question propounded by Ulpian. (D. 18, 2, 2, pr.)¹ It is in the contract of sale chiefly that examples of resolutive conditions occur. Their importance is confined to the question of ownership. In a suspensive condition, the ownership of the thing sold cannot vest in the buyer until the event happens; in a resolutive condition the sale is complete, and the thing sold, if delivered, becomes the property of the buyer, subject to his liability to be divested on the happening of the event. Thus a buyer under a suspensive condition cannot acquire by *usucapio*, and he is not entitled as owner to the produce. (D. 18, 2, 4, pr.; C. 4, 54, 3.) On the contrary, a buyer under a resolutive condition acquires by *usucapio*, is owner of all the produce, and must bear the loss if the thing should wholly perish. (D. 18, 2, 2, 1.) It must be observed, however, that the resolutive condition, if the event happens, does not divest the buyer of the ownership; it operates as a divestitive fact of the contract of sale, not of the ownership. Hence the seller must sue the buyer, if he refuses to give up the purchase, not as owner (by *vindicatio*), but as seller (by *actio ex vendito*). (D. 17, 5, 6; D. 17, 5, 2.)

Illustrations.

A farm is sold to Gaius on condition that the sale shall hold good if no better offer is made within six weeks. This is a suspensive condition. (D. 18, 2, 2, pr.)

¹ *Utrum pura emptio est, sed sub conditione resolvitur, an vero conditionalis sit magis emptio.*

A farm is sold to Gaius on condition that, if he changes his mind within six days, the sale will be off. This is a resolute condition. (D. 18, 1, 3.)

"You may have the farm for 100 *aurei*," but if any one before the kalends of January next offers better terms, the sale is to be off." (D. 18, 2, 1.) Is this a suspensive or resolute condition? Ulpian answers that it depends on the intention of the parties. If they intended the sale to be complete, but to be rescinded if a better offer were made, it is a resolute condition; if, on the other hand, that the sale would be completed only if no better offer were made, the condition is suspensive. (D. 18, 2, 2, pr.) This condition was called *in diem addictio*.

In diem Addictio.—The sale was not broken off unless within the time agreed upon a *bona fide* purchaser was found (D. 18, 2, 4, 5) who offered a higher price, or speedier payment, or payment at a more convenient place, or better security for payment. (D. 18, 2, 4, 6.) The offer must be accepted by the seller (D. 18, 2, 9), and the buyer must have declined to make an offer as good. (D. 18, 2, 7.) Hence the seller was bound to give notice to the buyer of the new offer. (D. 18, 2, 8.) If those conditions are fulfilled, the buyer must give up the produce (*fructus*) to the seller (D. 18, 2, 6, pr.), and the thing sold to the new purchaser. (D. 18, 2, 14, 4.) On the other hand, the buyer is entitled to his expenses for all beneficial expenditure on the thing sold. (D. 18, 2, 16.) The buyer has, however, no claim against the new purchaser for the restoration of what he paid to the seller; his only remedy is against the seller. (D. 18, 2, 20.)

A farm is sold on condition that if the purchase-money is not paid within a certain time, the sale shall be off. (*Si ad diem pecunia soluta non sit ut fundus inemptus sit*.) This is a resolute condition, and is called *lex commissoria*. (D. 18, 3, 2; D. 18, 3, 1.)

Lex Commissoria.—The condition was that if the price were not paid within the time fixed, the sale should be rescinded, and the buyer should forfeit the earnest (*arrahae*). (D. 18, 3, 8; C. 4, 54, 1.) Generally, also, it was agreed that if there was any loss on a second sale, the buyer should make it up. (D. 18, 3, 4, 3.) When such a condition is made, a seller has the choice of adhering to the sale, and suing the buyer for the residue of the price (D. 18, 3, 2; Vat. Frag. 3), or of rescinding the sale. But for this option he would occasionally be at the mercy of the buyer. Thus if a house sold were burned down, the buyer, under a resolute condition, must sustain the loss (D. 18, 2, 2, 1); but if by the simple expedient of not paying the residue of the price he could rescind the sale, the seller would be deprived of his rights. Once, however, the seller has made his election, he cannot afterwards alter his choice. (D. 18, 3, 4, 2; D. 50, 17, 75.) An acceptance of part of the purchase-money after the time fixed by the condition, was held to imply an adherence to the contract of sale. (D. 18, 3, 6, 2.)

V. IMPOSSIBLE AND ILLEGAL CONDITIONS.—Suppose the event making a condition is one that cannot or ought not to occur, what is the effect upon the contract? An event physically impossible, and an event forbidden by law, stand, in reference to this question, on exactly the same footing. What is illegality will be considered hereafter; at present it is enough to point out the effect of an impossible or illegal condition in a contract.

If an impossible condition be added to obligations, the stipulation is altogether invalid. Now a condition is held to be impossible if the very nature of things forbids its existence; as if a man said, "If I touch the sky with my finger, do you undertake to give it?" But if he stipulates thus: "If I do not

touch the sky with my finger, do you undertake to give it?" the obligation is understood to be made unconditionally, and therefore he can claim fulfilment at once. (J. 3, 19, 11; G. 3, 98.)

But a legacy left under an impossible condition the teachers of our school think just as valid as if that condition had not been added. The authorities of the opposing school, however, think the legacy as void as the stipulation. And in truth it is hard to give a satisfactory reason for making any distinction. (G. 3, 98.)

The argument of the Sabinians was, that once a man was dead he could not make his will anew so as to avoid the evil consequences of having it declared void; but that living persons could, if they pleased, make a new contract, and omit the impossible or illegal condition. But the law of legacy and contract rested upon the same foundation, the intention on the one hand of a testator to make a gift, and the intention on the other of a promiser to bind himself; and there appears no reason why a different rule of interpretation should be adopted in the two cases. Justinian, however, supported the rule of the Sabinians.

Illustrations.

Again, if any one had stipulated thus: "If a ship comes from Asia, do you undertake to give to-day?" the stipulation is void, because it is framed so as to put what should be first last. But since Lco, of illustrious memory, thought that in the case of dowries this same stipulation, called *praeputera*, ought not to be rejected, we have decided to give it full force; so that not only in dowries, but in every case, a stipulation so framed is valid. (J. 3, 19, 14.)

Again, a mandate given me to be carried out after my death is void. For it is held to be a general principle that no obligation can begin with the person of the heir. (G. 3, 158.)

No man can stipulate that a thing shall be given him after his death, nor yet after the death of him with whom he makes the stipulation. (J. 3, 19, 13; G. 3, 100.)

But a stipulation framed thus, as if Titius were to say, "At my death do you undertake to give it?" or "at your death?" was not void among the ancients, and is valid now. [It means that the obligation is imposed at the very latest moment of the stipulator's or promiser's life; for it seemed inconsistent that an obligation should begin with the person of the heir.] Again, we can rightly stipulate for a thing to be given after the death of some third person. (J. 3, 19, 15-16; G. 3, 100.)

And not even a man in another's *potestas* could stipulate for a thing after his death, because he seems to speak with his father's or master's voice. Again, if a man stipulated for a thing "to be given the day before I die or before you die," the stipulation was void. [For the day before a man's death cannot be told till death has followed. And again, when death has followed, the stipulation is reduced to one for past time, and is something of this sort: "Do you undertake that it shall be given to my heir?" which is certainly void.] (J. 3, 19, 13; G. 3, 100.)

Whatever we have said of death must be understood to be said also of *capitis deminutio*. (G. 3, 101.)

But since, as has been said, all stipulations come to be valid through the consent of the contracting parties, we have determined to introduce into this

branch of law a necessary correction. And so, whether it is after death or the day before the death of either the stipulator or the promiser for which the stipulation is framed, it is a valid stipulation. (J. 3, 19, 13.)

The rule that a man could not contract in such a way as to benefit his heir only and not himself, was simply an instance of a wider rule that one freeman could not make a contract to bind or benefit another. (D. 2, 14, 17, 4.) (See Law of Agency.)

Third—RESTRICTIONS ON INVESTITIVE FACTS.

The reason why the law interferes to compel persons to perform their agreements, is the enormous advantage to mankind of the confidence that arises from the legal enforcement of contracts. That reason ought also to determine what contracts should, and what should not, be enforced. In applying this reason, the first presumption is that every deliberate agreement should be sustained by the law. As a general proposition, it may be affirmed that every man is a fair judge of his own interest, and the mere fact of his making a promise is a strong reason for believing it to be for his advantage. But this rule is not without exception.

In the first place, a promise extorted by force or fraud will no doubt be favourable to the promisee, but equally it will be prejudicial to the promiser.

In the second place, the nature of the promise may show that it cannot be beneficial, or that while beneficial to the parties concerned, it may be prejudicial to the welfare of the State. Thus, no State could enforce an agreement to do an act forbidden by its law.

Lastly, the presumption that a contract is beneficial, is destroyed when it is made by a child or by any one incapable of estimating rightly the consequences of his acts.

The reasons for declaring contracts invalid may thus be considered under three heads: (1) On account of the inducements by which they were entered into; (2) on account of the promises conflicting with the welfare of the parties to the contract or of the State; and (3) on account of the absence of judgment in the persons binding themselves.

A. AGREEMENTS THAT ARE VOID ON ACCOUNT OF THEIR MODE OF ORIGIN. *Vis, Metus, Dolus, Sine causa, Injusta causa.*

It is sometimes said that force or fraud vitiates consent, and is therefore fatal to a contract; but it would be more accurate to say that force is inconsistent with free consent, and that consent should not bind any one unless it is given freely. This

distinction is taken by Paul with reference to the acceptance of an inheritance by a person appointed heir. Such an acceptance, even if procured by force or fraud, was irrevocable, until at some time the Praetor interfered and annulled the act (*restitutio in integrum*). For, says 'Paul, although if left to my own choice I would not have accepted, still I preferred that to the threatened violence. (D. 4, 2, 21, 5.)¹ Again, the formal modes of manumission were not even to the latest times vitiated by force or fraud (p. 28). In like manner, the formal contracts were not void although procured by force or fraud. A colleague of Cicero introduced an equitable defence (*exceptio doli*) when a formal contract was made through fraud; and to the latest period the traces of this innovation may be remarked.

For instance, if you, constrained by fear or led on by fraud, or falling into a mistake, have promised to a stipulator, Titius, what you ought not to have promised, it is evident that by the *jus civile* you are bound, and the action whose *intentio* is "that you ought to give it" is of full force. But it is unfair that you should be condemned; and therefore you are given an *exceptio* grounded on that fear or wilful fraud, or one framed *in factum*, in order to resist his action. (J. 4, 13, 1.)

The non-formal contracts of the Roman Law were said to be *bonae fidei*; in other words, they were *ipso facto* void if made through fear or fraud.

I. *Vis* (Violence) and *Metus* (Intimidation).

1. Definition of Violence and Intimidation (*Vis*, *Metus*).

"Violence" is when a contract is made in consequence of the actual exercise of superior force. (D. 4, 2, 2.)²

"Intimidation" is a threat of such present immediate evil as would shake the constancy of a man of ordinary firmness. (D. 4, 2, 5-7.)

Violence or Intimidation does not vitiate a contract, unless it is illegal.

Illustrations.

A stipulation extorted by the threat of death or bodily torment is voidable. (C. 2, 20, 7.)

A man is shut up in a house, in order to induce him to make a promise. Such a promise cannot be enforced. (D. 4, 2, 22.)

A person compels me to give him money by threatening to destroy the title deeds of my freedom, which are in his possession. The money can be recovered. (D. 4, 2, 4; D. 4, 2, 8, 1.)

A usurer retains an athlete, and prohibits him from going to the games until the

¹ *Quia, quamvis si liberum esset, noluissem; tamen coactus volui.*

² *Vis est majoris rei impetus qui repelli non potest.*

master of the athlete promises a sum not due to the usurer. This promise is void. (D. 4, 2, 23, 2.)

A person sells his house or gardens to a man that threatens him, if he does not do so, with the loss of his nomination for municipal honours. The sale is not vitiated by the threat. (C. 2, 20, 8.)

In the course of an angry altercation, one of the parties uses threatening language to the other. This is not intimidation (*Metus*). (C. 2, 20, 9.)

An owner of land hearing that his neighbour is coming to dispossess him with an armed force, takes to flight, and his neighbour takes possession. This is not possession by violence, because the owner ran away from a danger not immediate. But if the owner remained until the armed men had entered on the land, then the dispossession was by violence (*vi et armis*). (D. 4, 2, 9.)

A Praetor requires a defendant to make a stipulation to save his neighbours harmless if his house should fall down, and informs him that if he refuses he will give his house into the custody of the complainant. A stipulation made under this threat is valid, because it is in the exercise of the Praetor's jurisdiction. (D. 4, 2, 3, 1.)

A magistrate threatens to condemn an innocent person to death, but offers to let him off if he will promise by stipulation to give him a large sum. This promise is not valid, because it is extorted by the unlawful exercise of his power. (D. 4, 2, 3, 1.)

Titius threatens to accuse Gaius of the crime of stealing his cattle. Gaius, with the hope of escaping prosecution, offers a large sum to Titius. This promise is valid. (C. 2, 20, 10.)

A freedwoman wrongfully sued her patron, who threatened again to reduce her to slavery for her ingratitude. She induced him to refrain from doing so by promising him a sum of money. The promise is valid. (D. 4, 2, 21, pr.)

A person is caught committing a crime, as theft or adultery, and promises a sum under fear of assault. If the criminal is afraid not of the lawful punishment to which he has exposed himself, but of his life, which could not lawfully be taken, the intimidation is illegal. For it was not lawful to kill every one caught in adultery. (D. 4, 2, 7, 1.) Those who took money to conceal a discovered adultery were liable to punishment by the *lex Julia de adulteriis*. (D. 4, 2, 8.)

2. Violence and Intimidation (*Vis, Metus*), whether caused by the promisee or by a stranger to the contract, makes it voidable. The defence of violence or intimidation was said to be conceived *in rem*—that is, was available by whomsoever the violence or intimidation was perpetrated. (D. 4, 2, 9, 1.) The terms of the defence were, "if there was no intimidation." (*Si in ea re nihil metus causa factum est.*)

II. DOLUS.—Cicero relates a case where a Syracusan banker, Pythius, induced a Roman knight of the name of Canius to buy gardens from him. The price was so exorbitant that the sale would have been set aside on the ground of fraud. Pythius, knowing this, obtained the consent of Canius to enter the price in his books as a sum due, according to the form of the *expensilatio*. By this means the sale was merged in the written contract. Canius was sued on the written contract. Could he plead fraud? No, says Cicero, for my colleague Aquilius had not then introduced

the equitable defence of fraud in formal contracts. (Cic. de Off. 14, 58-60.)

1. *Dolus* is a word of many meanings. In the law of contract it covers every act or default against good conscience. The definitions given in the Digest (D. 4, 3, 1, 2) are neither very precise nor very accurate. *Dolus* occurs chiefly in two forms—either the representation as a fact of something that the person making the representation does not believe to be a fact (*suggestio falsi*), or the concealment of a fact by one having knowledge or belief of the fact (*suppressio veri*). Examples of both kinds will be found in the following illustrations. (D. 18, 1, 43, 2; D. 19, 1, 49; D. 40, 7, 10.)

A seller telling a lie to a buyer respecting the skill or *peculium* of the slave sold, must either make good the difference in value or submit to have the sale cancelled. (Paul, Sent. 2, 17, 6.)

A seller of land was liable to a penalty of double the value of the object sold if he told a lie concerning it. (Paul, Sent. 2, 17, 4.)

A seller, who sells a *statuliber*, supposing him to be a slave, must make good the loss to the buyer when the slave attains his freedom (D. 21, 2, 39, 4); but if he knew that the slave was a *statuliber*, he is bound to give compensation to the buyer, even before he attains his freedom. (D. 19, 1, 30, 1.)

A creditor selling a pledge did not warrant against eviction, so far even as to be obliged to restore the price. But if he knew he had no right of sale, or that the property did not belong to his debtor, he was liable for concealing the flaw in the title. (D. 19, 1, 11, 16.)

Titius sells an estate, of which a certain part is not in his possession, and without informing the buyer of the fact agrees to sell the land within the limits of his possession. Titius must make good the loss. (D. 19, 1, 39.) The seller is bound to set forth truly the boundaries of the land. (D. 18, 1, 35, 8.)

Gaius in treaty for the purchase of the farm of Titius went out with Titius to see it. After the visit, and before the contract of sale, a number of trees are blown down by the wind. Can Gaius claim the trees? Not as buyer, because the trees were severed from the land before the date of the contract; but if Titius knew, and Gaius did not, that the trees had been thrown down, then Titius must pay the value of the trees. (D. 18, 6, 9.)

Titius in selling land to Gaius does not inform him of a rent on the land (*tributum*). Titius must give compensation if he knew the fact. (D. 19, 1, 21, 1.)

Titius sells a house in Rome to Gaius, saying nothing about an annual sum payable for an aqueduct. In an action for the price, Titius, having deceived the buyer by concealing the fact, must submit to a deduction from the price. (D. 19, 1, 41.)

A seller was not responsible for servitudes on the land, unless he knew of their existence, and did not inform the buyer. (D. 21, 2, 75; D. 19, 1, 1, 1; D. 18, 1, 66, pr.)

A seller who did not inform a buyer of servitudes belonging to the land, and which the buyer lost by non-use, was liable for damages. (D. 18, 1, 66, 1.)

A seller knowingly sells a slave given to stealing. Although this is not within the edict if the seller is ignorant of the vice, he is responsible for loss caused by the slave's thefts. (D. 19, 1, 4, pr.)

Titius, taking advantage of the ignorance of Gaius, sells him a female slave as having given birth to children when she had not. Although this was not a case

where the *Ædile's* edict required a warranty, yet Titius for his fraud must submit to reduction of the price, or to have the slave returned. (D. 19, 1, 11, 5.)

A person lets a farm that he knows to grow noxious herbs, without informing the farmer of the circumstance. Some of the cattle put upon the land are poisoned by the herbs and die. The landlord must make good their value. (D. 19, 2, 19, 1.)

A vendor knowing that the land sold is subject to a special servitude, says nothing about it, but inserts a general clause that he is not to be held liable for any servitude that may turn up. He may nevertheless be sued for the concealment. (D. 19, 1, 1, 1.)

Titius sells Gaius some rotten wood for building. The result is that the house falls down. If Titius knew the wood was rotten, he must pay for all the damage caused by the rotten wood; if he did not know, then the price is reduced to the sum that the buyer would have given if he had known the state of the timber. (D. 19, 1, 13, pr.)

Titius sells an ox to Gaius. The ox is suffering from a contagious disorder, which affects and destroys all the cattle of Gaius. If Titius knew that the ox was diseased, he must pay the value of all the cattle of Gaius; if he did not know, then only what Gaius would have given if he had known the ox was diseased. (D. 19, 1, 13, 2.)

Titius sells Gaius a slave that had a vice of running away. The slave runs away from Gaius with much valuable property. If Titius knew of the slave's vice, and did not mention it to Gaius, he must pay Gaius not only the price of the slave, but the value of the property carried away. If he did not know, he is bound to return only the price of the slave. (Paul, Sent. 2, 17, 11.)

2. The defence of fraud was available only when the fraud of the promisee was alleged (*Si in ea re nihil dolo malo actoris factum est*): and when the fraud was perpetrated by a third party, the only remedy of the promiser was against him in an action for fraud (*actio de dolo*). (D. 44, 4, 2, 1.)

The burden of proving fraud rested upon the person alleging it. (C. 2, 21, 6.)

III.—*Dolus*, as want of valuable consideration (*sine causa*).

A formal contract did not need a consideration, and prior to Aquilius was not vitiated even by fraud. His innovation was intended to remedy this inconvenience of the civil law, so that men should not be able to avail themselves of its strictness and formality to act against natural justice.¹ This remedy, having so wide a scope, applied where, although there was no fraud in the initiation of the contract, yet to insist upon its performance would have been against good conscience. This limit may be defined by reference to the idea of valuable consideration. A formal contract did not require a consideration; but if there actually was a consideration intended, without which the contract would never have been made, and such consideration failed, it would have been against good conscience to take advantage of the formal nature of the contract, and insist upon

¹ *Hanc exceptionem [doli mali] Praetor proposuit, ne cui dolus suus, per occasionem juris civilis, contra naturalem aequitatem prosit.* (D. 44, 4, 1, 1.)

its performance. This is the meaning of saying that a stipulation made *sine causa* could not be enforced; that it was *dolus* to ask its performance. Thus, in effect, a stipulation was voidable unless either it was made gratuitously, or for a consideration that did not fail.¹

Illustrations.

Titius agrees to advance money to Gaius on loan; and Gaius, before receiving the money, promises by stipulation to give the amount to Titius at a future day. The day arrives, but Gaius has never received the loan. If Titius sues Gaius on the stipulation, he will be repelled by the equitable defence of fraud (*exceptio doli*). (D. 44, 4, 2, 3.)

Maeuius, when sick, promised by stipulation 100 *aurei* to his wife's cousin, with the intention that his wife should have the money after his death. He, however, recovered, and was sued by the cousin for the 100 *aurei*. The cousin could be repelled by the plea of fraud. (D. 44, 4, 4, 1.)

Gaius, under the false impression that he owed money to Sempronius, promised him the amount by stipulation. Sempronius, if he attempted to recover the money, would be defeated by the plea of fraud. (D. 44, 4, 7, 1.)

A father promised a dowry for his daughter, and agreed to support her and her servants. Not knowing that if he kept his daughter he was not bound to pay interest on the amount promised as dowry, he wrote to the husband admitting that he owed interest on the dowry. Could the husband maintain an action on the stipulation or chirograph for interest? Not without fraud, when the promise was made in error. (D. 44, 4, 17.) If the promise were by chirograph, the promiser could require the written document to be delivered up to him. (D. 12, 7, 1; D. 12, 7, 3; C. 2, 5, 1.)

IV.—ILLEGAL CONSIDERATION (*Injusta* or *Turpis Causa*).

No contract could be enforced if it were made for an illegal consideration, in which the inducement, as distinguished from the promise, was illegal. (C. 4, 7, 5; C. 4, 7, 1.) The defence is either fraud, or a statement of the illegality (*Exceptio doli mali* or *Exceptio in factum*). (D. 12, 5, 8; D. 45, 1, 123.)

B. IMPOSSIBLE AND ILLEGAL PROMISES.

(A.) Impossible Promises.

A promise may be impossible to be performed either because the acts are physically impossible or legally impossible. Of the latter sort, an instance is when I undertake to give the ownership of a thing to another, when the thing cannot be the object of ownership. *Impossibilium nulla obligatio est*. (D. 50, 17, 185.)

If a man stipulates that something shall be given him which, in the nature of things, does not exist or cannot exist,—Stichus, for instance, who is

¹ *Nil refert utrumne ab initio sine causa quid datum sit, an causa propter quam datum sit, secuta non sit.* (D. 12, 7, 4.)

dead, but whom he believed to be alive [a freeman he believed to be a slave, a sacred or devoted spot he thought subject to man's law], or a hippocentaur that cannot exist,—then the stipulation will be void. (J. 3, 19, 1; G. 3, 97, 97A.)

Illustrations.

Julius agrees to deliver 100 tons of copper to Maevius. Julius has not got the copper, and cannot perform his contract. The contract is valid. Impossibility exists only when no human being can perform the promise. (D. 45, 1, 137, 5.)

Titius and Gaius agree by stipulation that Gaius shall give Titius the same day 100 *aurei* at Carthage. The contract is made in Rome. If each party had previously notified to his agent in Carthage that such a promise was to be made, there is no impossibility in the performance, and the stipulation is valid. (D. 45, 1, 141, 4.)

The rule of law is the same if a man stipulates that there shall be given him an object that is sacred or devoted, believing it to be under man's law; or public and set apart for ever to the people's use, as a forum or a theatre; or a freeman believing him to be a slave; or a thing in which he has no right to trade (*commercium*), or that is his own. And the stipulation will not remain in suspense, because what is public may become private, because the freeman may be made a slave, because the stipulator may obtain a right to trade, or the thing that belongs to him cease to be his: but it is from that moment void. Again, conversely, although at first the thing is made the object of a stipulation that is valid, if afterwards it comes into the same case as those above mentioned, and this not by the promiser's doing, the stipulation is put an end to. And not even at the very first will such a stipulation as this be valid—"Do you undertake to give me Lucius Titius when he shall become a slave?" and the like. For what by its own nature is outside ownership by us, can in no way be reduced into an obligation. (J. 3, 19, 2.)

Everything that is the object of ownership can be brought into a stipulation, whether it is a moveable or landed property. (J. 3, 19, pr.)

Titius buys two slaves for one price. At the time of the sale one of the slaves was dead. The sale is void as to both. (D. 18, 1, 44.)

Stolen goods, by the XII Tables, could not be sold. (D. 18, 1, 34, 3.)

A fugitive slave also, by a *Senatus Consultum*, was not capable of being sold. (D. 18, 1, 38, 3.)

Grain for public distribution could not be sold. (C. 4, 40, 3.)

Further, a stipulation is void in which a man through ignorance that a thing is his, stipulates that it shall be given him. For what is a man's cannot be given him. (G. 3, 99.)

Again, if any man stipulates that a thing that will become his shall in that event be given him, the stipulation is void. (J. 3, 19, 22.)

Spots sacred or devoted, and also public places, as a forum or basilica, it is in vain for any one to buy knowingly. But if he buys believing them, through the vendor's deceit, to be private property, or profane, he will have an *actio ex empto*, that since he may not have the object, he may yet recover what it would have been worth to him not to be deceived. The rule of law is the same if he buys a freeman for a slave. (J. 3, 23, 5.)

Gaius stipulates for a sword belonging to himself to be given to him if a certain event happens. Before the event happens the sword ceases to belong to him. The stipulation is valid. (D. 45, 1, 31.)

Titius is owner of an estate of which he has not the possession. From the person in possession he buys the right of possession, in order that in a suit for the recovery of the property he should be defendant, and so escape the necessity for making out his title. The sale is valid, although, *ex hypothesi*, the thing is his property. (D. 18, 1, 34, 4.)

Titius buys Stichus from Gaius. Stichus, however, is really free. Is the sale valid? If both Titius and Gaius believe that Stichus is a slave, many hold that the sale is valid; so if Gaius, the vendor, alone knows; but if Titius, the buyer, knows that Stichus is free, the contract is invalid. (D. 18, 1, 70; D. 18, 1, 4.)

Titius buys a slave that both he and the vendor believe to be alive. At the time of the sale the slave is dead. There is no contract. (D. 18, 1, 15, pr.)

Titius bought a house from Gaius, neither of them knowing that at the time of sale the house was burned to the ground. Nerva, Sabinus, and Cassius hold that the sale is void, and the price, if paid, can be recovered. Neratius says that if it is only partially burnt, so that a half or more of it remains, the sale is good, and a fair abatement is to be made from the price; but if it is more than half burnt, the sale is void. Suppose Gaius, the seller, alone knew, and Titius did not. If the whole house is burnt, the sale is void; if any considerable part remains, the sale is valid, but the seller must pay damages. If Titius the buyer knew, but not Gaius the vendor, the sale is good, and the whole price must be paid. If both knew that it was burnt in whole or in part, both have made *dolus*, and the contract is void. (D. 18, 1, 34, 3; D. 18, 1, 57, pr.—3.)

(B.) Illegal Promises.

Promises are void when they are made against some law, or public policy, or morality. (C. 2, 3, 6.)

A promise for some base end, as to kill a man or to commit sacrilege, is not valid. (J. 3, 19, 24)

No mandate is binding that is contrary to good morals, as when Titius gives you a mandate to steal, to do harm, or to injure any one. For although you undergo punishment on account of that very deed, yet against Titius you have no action. (J. 3, 26, 7; G. 3, 157.)

A person under 20 promised by stipulation to release his debtor if he manumitted a slave. This is void, as against the policy, although not the precise terms, of the *lex Ælia Sentia*. A person above 20 could do so. (D. 45, 1, 66.)

An agreement that one of the parties to a contract should not be responsible for his wilful acts and defaults (*dolus*) is, void. (D. 13, 6, 17; D. 2, 14, 27, 3.)

An agreement not to sue if any theft or *injuria* be committed is void. (D. 2, 14, 27, 4.) But after a delict is committed (as theft), an agreement may be made not to sue the wrongdoer. (D. 2, 14, 7, 14.)

Can a vendor impose on a purchaser an obligation not to sell without the consent of his neighbour, or not to bury any one on his land? He could not, by mere pact, but he could by a stipulation with a penalty, because the prohibition was not illegal and the penalty could be enforced. (D. 2, 14, 61; D. 11, 7, 11.) But Justinian sanctioned all such pacts as had for their object to prevent the conversion of private property into a public or sacred thing. (C. 4, 54, 9.)

"If you do not make me your heir, do you promise me 100 *aurei*?" Such a stipulation is void, because it is discreditable to be casting eyes on a living man's inheritance. (D. 45, 1, 61; D. 27, 6, 2, 2.)

An agreement between two that the survivor should have the whole of the deceased's property is void, unless between two soldiers taking the risk of a coming battle. (C. 2, 3, 19.)

An agreement among heirs expectant to take the property of the deceased in certain shares is void, unless the deceased agreed to it, and did not change his intention up to his death. (C. 2, 3, 30.)

An agreement in a marriage settlement (*pactum dotale*) that the wife should, along with her brother, take her father's inheritance in equal shares, is void, as depriving the father of freedom of testamentary bequest. (C. 2, 3, 15.)

A woman in marrying a man stipulated for 200 *aurei* with her husband, if he should renew his intercourse with a concubine he had at the time of the marriage. The contract is valid. (D. 45, 1, 121, 1.)

"If I marry you, will you give me 10 *aurei*?" This is void, unless the 10 *aurei* are to be a dowry, because it introduces a mercenary element into marriage.

"If by your fault a divorce occurs, do you promise to give 10 *aurei*?" This stipulation is void, because it interferes with the freedom of divorce (*libera matrimonia esse antiquitus placuit*), and because the parties ought to be content with the penalties fixed by law. (D. 45, 1, 19.)

Titia had a son Maevius by her first husband, and she married Gaius Seius, who had a daughter Cornelia. Titia and Seius betrothed Maevius to Cornelia, and both Titia and Seius agreed to pay a penalty if they obstructed the marriage. Gaius Seius died, and Cornelia refused to marry Maevius. Were the heirs of Seius liable for the penalty? No, because it was indecent to annex a penalty to the continuance even of an existing marriage. (D. 45, 1, 134.)

A person promises by stipulation to marry his adopted sister. The contract is void, even if the sister is afterwards emancipated. (D. 45, 1, 35, 1.)

An agreement by which one person undertakes to conduct a lawsuit of another, receiving a certain share of the proceeds (*partum de quotu litis*), is void; but an agreement to advance money on loan to support litigation is valid, if nothing but the money lent with lawful interest is to be returned. (C. 4, 35, 20; D. 2, 14, 53; D. 17, 1, 7.)

An agreement for the sale of a poison that, even when mixed with other ingredients, serves no useful purpose, is void; if when so mixed it is of use, the sale is valid. (D. 18, 1, 35, 2.)

The chief physicians (*Archiatři*) could take a reward from their patients when recovered, but could not enforce any promise of remuneration made by them when sick. (C. 10, 52, 9.)

C. INCAPACITY OF PERSON.

(A.) Incapacity arising from the civil law.

I. Slaves and freemen in *mancipio*.

As regards slaves and persons in *mancipio*, the rule of law is that they can come under no obligation, either to the person in whose *potestas* or *mancipium* they are, or to any one else. (G. 3, 104, as restored.)

In every contract there are a creditor and a debtor. A person may be incapable of being a creditor, but capable of being a debtor; or he may be capable of being a debtor without being capable of being a creditor. Incapacity must be considered with reference to those points separately.

1. A slave could not be a creditor, so as to bring an action.

Even a *statuliber*, a slave to whom freedom has been given subject to the happening of an event, cannot make himself a creditor. (C. 4, 14, 1.) Nevertheless in some instances effect was given to contracts made by slaves.

Illustrations.

A slave is manumitted and instituted heir, subject to a condition by the will of his master. Before the condition was fulfilled, he made a compromise with the creditors of the estate. Afterwards the event happened, and he entered on the inheritance. Could the heir now meet the creditors, if they sued for their whole debts, with the plea that they had by agreement waived their rights? (*Exceptio pacti*.) No, because a slave was as incapable of making a pact as a contract. But he was not left without remedy. He could use the defence that the demand of the creditors was against good conscience (*exceptio doli*). (D. 2, 14, 7, 18.)

A master owes (as a *naturalis obligatio*) a sum to his slave, which on the slave's manumission he pays to him, thinking he was compelled to do so by the law. In this the master was wrong, but he cannot recover the money, because the debt was binding in conscience (*quia naturale agnovit debitum*). (D. 12, 6, 64.)

2. A slave cannot be a debtor. The promises made by a slave do not bind him, after attaining freedom, so as to subject him to any action. By their contracts, slaves cannot bind themselves, according to the civil law; but according to the law of nature they can be either creditors or debtors.¹ (D. 44, 7, 14.) In a few other cases, also, as deposit and mandate, good conscience requires slaves who have been freed to deliver up that which is not their own, but is held in confidence.

Illustrations.

A woman appointed her husband her heir, and gave freedom by way of trust to her slaves; among others, to Stichus, her husband's steward. She dies, and in the absence of her husband Stichus obtains his freedom by decree. No action lies at the instance of the husband against Stichus to make him account for his administration. (D. 40, 5, 19.)

Stichus induced his master, Sempronius, to manumit him, by promising a sum of money. After the manumission Sempronius neglected to require a stipulation. He has, nevertheless, an action against Stichus, on the equitable ground that he has manumitted Stichus. This is a considerable step, because although Stichus was free before he could be called on to perform his part of the contract, yet he was a slave when the agreement was made. But here the special character of the equitable contracts came into play. The duty imposed on Stichus arises from the performance of Sempronius, and it therefore does not exist until Stichus is free. (C. 4, 14, 3.)

Stichus receives a loan from Titius, and with the money buys his freedom. Titius has no action against Stichus to recover the loan (C. 4, 14, 2), but if Stichus pays Titius, he cannot ask back his money on the ground that it was not due. (D. 46, 3, 83.)

¹ *Ex contractibus autem civiliter quidem non obligantur; sed naturaliter obligantur et obligant.* (D. 44, 7, 14.)

Stichus applies for a loan to Gaius. Gaius requires security. Stichus gives him in pledge another slave, forming part of his *peculium*. He also induces Titius, a freeman, to become surety for the debt, and another freeman, Cornelius, to mortgage a small farm. What remedies has Gaius? He cannot sue Stichus, but he can keep the slave, compel Titius to pay the debt, and Cornelius to surrender the farm—all, if necessary, until he has recovered the whole of the money lost. The reason is, that the debt of Stichus is binding in conscience (*naturalis obligatio*). (D. 12, 6, 13, pr.)

A silver vase is given to a slave Pamphilus for safe custody. Pamphilus is manumitted. The owner can sue him for the restoration of the vase. (D. 16, 3, 21, 1.)

A slave, Stichus, in obedience to a mandate, executes certain orders. For what he does in slavery he cannot be sued on attaining his freedom, unless he continues to act after gaining his freedom on the same mandate, and what he does after manumission is so closely united with what he did before manumission as to be inseparable. Thus Stichus buys land and builds on it, and the building falls into decay. After manumission he lets the land. This alone can be made the subject of an action, not the purchase of the land, a quite different transaction, completed while he was still in slavery. (D. 3, 5, 17.)

3. The incapacity of a slave to contract is thus on a level with his incapacity to own property. But just as a slave could enjoy *quasi* rights of property, so he might have to the extent of his *peculium* a capacity for contract. We saw that as between the master and the slave the *peculium* had no substantial legal existence; as between the slave, however, and third parties, the *peculium* was treated as the slave's property. The slave, indeed, could not appear either as plaintiff or defendant in a court of law, but when he was creditor his master could sue, and when he was debtor his master could be sued, and was responsible to the extent of the *peculium*. Generally, then, it may be said, that to the extent of the *peculium* a slave could make contracts, and either bind himself or others in every case where a freeman could do so. (D. 15, 1, 29, 1.)

Thus if the slave were under the age of puberty, he was bound only where a free boy would be bound, if he had not obtained the consent of his *tutores*. (D. 15, 1, 1, 4.) There were, however, two noteworthy limits to the remedy of a slave's creditor; (1) the master had a right to deduct all claims he himself had against the slave (D. 15, 1, 9, 2); and (2) he was not liable if the slave gratuitously undertook to answer for the debt of another. (D. 15, 1, 3, 5.) A slave could, however, be a surety if it was for the sake of his own *peculium*. (D. 15, 1, 47, 1.) The remedy of the creditor of a slave was the *actio de peculio* against the master. It could be brought at any time while the slave was under his master, and for one year after his manumission. (D. 15, 2, 1, pr.)

When the amount of the *peculium* is in question, there is first deducted all that the slave owes to his master, or to any one in his *potestas*, and what remains over is alone understood to be the *peculium*. Sometimes however, a slave's debt to a person in his master's *potestas* is not deducted from the *peculium*, as when the debt is due to a person forming part of that very slave's *peculium*. Now the bearing of this is, that if a slave owes any-

thing to his *vicarius* that sum is not deducted from his *peculium*. (J. 4, 7, 4 ; G. 4, 73.)

Vicarius is a slave held by another as part of his *peculium*.

There are, besides, certain actions in which we do not seek the entire sum that is owed us, but in which we sometimes obtain the entire sum, sometimes less. For example, if we bring an action against the *peculium* of a son or slave, and the *peculium* is not less than we seek, then the father or master is condemned to pay the entire sum. But if it is less, then the *judex* condemns him to pay so far as the *peculium* will go. How the word "*peculium*" is to be understood we will set forth in its own place. (J. 4, 6, 36.)

Merx Peculiaris.—When the *peculium* was employed by the slave, with the knowledge of his master, as capital in business, the liability of the master was somewhat increased. (D. 14, 4, 1, 3.)

Another action, too, has been brought in by the Praetor, called *tributoria*. [It lies against a father or a master, and was established by the Praetor's edict "Concerning retail trade and goods."] For if a slave engages in some special trade with his master's knowledge, and contracts any debts therein, then the Praetor lays down the law thus :—All the capital sunk in the trade and the profits he orders to be shared between the master (if anything shall be due to him) and the other creditors proportionally. The master is allowed to allot the amounts, and therefore if any creditor complains that his share is less than it ought to be, the Praetor gives him this action, called *Tributoria*. (J. 4, 7, 3 ; G. 4, 72, as restored.)

The chief differences between the *peculium* simply, and when it was used in trade (*merx peculiaris*), in addition to the mode of distribution, are (1), that if the master forbids the slave making contracts, as by a notice in the shop, he cannot be sued by the *actio tributoria*, although he is still liable generally in respect of the *peculium*. (D. 15, 1, 47.) (2) The *actio de peculio* can be brought against a purchaser of a slave, but not the *actio tributoria* (D. 14, 4, 10). (3) The *actio tributoria* is not limited to a year after the manumission of the slave, but is perpetual. (D. 14, 4, 7, 5.) A creditor could not bring both actions ; he must elect between them. (D. 14, 4, 12.)

II. Persons under *potestas* or *manus*.

As we have made mention above of the action that is brought against the *peculium* of *filii familiae* and of slaves, we must needs call for more careful attention to this action and to the rest that are usually given on the same account against parents or masters. Now, whether it is with slaves or with persons in the *potestas* of a parent that business is transacted, the rules of law that are observed are pretty much the same. To avoid, therefore, a wordy discussion, let us direct our remarks to the case of slave and master, with the understanding that the same remarks apply also to children *in potestate* and their parents. If any special rule is observed in regard to the latter, we will point it out separately. (J. 4, 7, pr. ; G. 4, 69.)

But just as we saw, in the case of property, that a son could become a true owner to all intents and purposes (*peculium*

castrense); so again, under contract, the disabilities of a son are not so great as those of a slave. One distinction is obvious. The disabilities of a son under *pōtestas* were temporary; the death of his father released him; a slave was a slave for ever, unless released by manumission. The distinction is brought out in *Adstipulatio*.

Again, a slave in becoming an *adstipulator* acts in vain, although by a stipulation in any other case he acquires for his master. The same rule holds for a person *in mancipio*, according to the better opinion; for he is in the position of a slave. He, again, that is in a father's *pōtestas*, acts not in vain; but he acquires nothing for his parent, as he would by a stipulation in any other case. And even against himself an action is available only if he goes out of the *pōtestas* of his parent without a *capitis deminutio*—by his father's death, for instance, or by being himself installed as *Flamen Dialis*. What we have said must be understood to apply to a *filiofamilias* and to a wife *in manu* as well. (G. 3, 114.)

1. A person under *pōtestas* cannot be either creditor or debtor to his *paterfamilias*.

Again, a stipulation is void if made by you with a person in your power; or conversely, if made by him with you. But a slave can come under no obligation either to his master or to any one else; whereas *filiofamilias* can come under obligation to others. (J. 3, 19, 6; G. 3, 104.)

2. In respect of other persons, the general rule is that a son cannot be a *creditor*, but may be a *debtor*, and can be sued on his contracts. This makes a marked difference between the son and the slave. (D. 44, 7, 39.)

(1.) *Filiusfamilias* as *creditor*.—The general rule was that a son acquired for his father, not for himself. We have already seen under what circumstances a son could sue for injuries done to him (p. 50). He could also sue in the action for *depositum* (D. 16, 3, 19); *commodatum* and the interdict *quod vi aut clam* (D. 44, 7, 9); and generally the innominate equitable contracts. (D. 44, 7, 13.)

(2.) *Filiusfamilias* as *debtor*.—When a son makes a promise, he can be sued exactly as if he were a *paterfamilias*. (D. 45, 1, 141, 2; D. 46, 4, 8, 4.) If he has a *peculium*, his *paterfamilias* may be sued. (D. 15, 1, 44; D. 15, 1, 45.)

Gaius, son of Titius, is a member of a firm. Titius emancipates him. Does this dissolve the partnership, and against whom have the other partners a remedy? The partnership is not dissolved, although it would have been if Gaius had been a slave. (D. 17, 2, 58, 3.) The partners have an action against Titius (so far as Gaius has any *peculium*) for all obligations incurred before the emancipation. Also Gaius can be sued in respect of all his transactions with the firm before or after the emancipation. (D. 17, 2, 58, 2.)

It must be remembered that in respect of *peculium castrense* a son was as perfectly capable of making contracts as if he were not under *potestas*.

It is most probable that between a son and a daughter under *potestas* the Roman law recognised no difference in respect of the capacity to contract. (D. 14, 6, 9, 2.)

III. Women in tutela.

The rule of law is the same for women in tutela. (G. 3, 108.)

It will be convenient to defer this head of incapacity until the "Perpetual Tutelage of Women" is examined. (See Div. II.)

(B.) Incapacity arising from Mental Weakness.

I. Mental alienation (*furiosi, mente capti*).

A madman can transact no business, because he does not understand what he is doing. (J. 3, 19, 8; G. 3, 106.)

The incapacity of the insane is absolute. They are incapable of either judging prudently of their own affairs, or of understanding the effect of their own acts. They cannot, therefore, acquire any rights that involve consent; they cannot be creditors any more than debtors. (D. 44, 7, 1, 12; D. 50, 17, 40.) For this purpose, acute insanity (*furor*) or imbecility (*dementia*) has the same effect. (C. 5, 4, 25.) In the case, however, of those subject to paroxysms of insanity, separated by lucid intervals, there was no reason why their legal incapacity should be sustained; and, accordingly, it was held that a person, sometimes insane, could, when in a rational mood, bind himself and others by contract. (C. 4, 38, 2.) A question arose in regard to those under curators, whether in a lucid interval the office of curator was only suspended, or whether the return of the patient to sanity, although he was not permanently recovered, made the appointment altogether void. Justinian enacted that the curator's office should not be affected, but that while the lucid interval lasted the curator should refrain from acting. (C. 5, 70, 6.)

II. Persons under the age of puberty (*impuberes*).

1. Could they be creditors? The answer is clearly and indisputably in the affirmative.

A *pupillus* can bring another under obligation to him even without authority from his *tutor*. But what we have said of *pupilli* is true only of those that already have some understanding. For an infant, or very nearly so (*infantiae proximus*), differs little from a madman, because *pupilli* at such an age have no understanding. But in the case of those that are not

infants, but only very nearly so, for their benefit the law is interpreted very favourably, so that they have the same rights as those that are very near puberty. (J. 3, 19, 9-10; G. 3, 107-109.)

According to the text, a child that can speak can be a stipulator, but not a promiser; a creditor, but not a debtor. (D. 26, 8, 9, pr.; D. 12, 6, 41; C. 8, 39, 1.)

2. Could they be debtors?

A *pupillus* can rightly transact business of any kind, if only his *tutor* is employed, whenever his authority is needed, as when the *pupillus* himself is coming under an obligation. (J. 3, 19, 9; G. 3, 107.)

But a child under puberty in his parent's *potestas* cannot, even with his father's authority, come under an obligation. (J. 3, 19, 10.)

What legal effect, if any, belonged to those promises made by children, under the age of puberty, without the sanction of a tutor? Did such promises give rise to natural obligations, or were they absolutely void? On this question may be ranged in controversy the classical jurists as well as their modern commentators.

Rufinus, a jurist who seems to have been a contemporary of Paul and Ulpian, answers the question with an unqualified negative (D. 44, 7, 59); and Neratius, who attained promotion under Trajan and Hadrian, clenches his view by the statement, that even if a *pupillus* pays a debt contracted without the sanction of a *tutor*, he may recover the money, because it is not even a debt due by conscience (*quia nec natura debet*). (D. 12, 6, 41.) On the other hand, the names of three far greater jurists, Papinian, Paul, and Ulpian, can be quoted on the opposite side. (D. 46, 3, 95, 4; D. 46, 2, 1, 1; D. 35, 2, 21 pr.; D. 3, 5, 3, 4.) The weight of authority, therefore, rests with the view that a *pupillus* contracts a natural obligation, when he acts without the sanction of his *tutor*.

III. Minors (*minores viginti quinque annis*).

The Roman Law, which in its earlier stage left women all their lifetime either under *potestas* or *tutela*, was singularly indulgent to the male sex, and a boy sufficiently mature to be capable of marriage at once attained his legal majority. In the course of time the inconvenience of so vague a standard led to the fixing of fourteen years as at once the age of puberty and of legal majority. About the sixth century, before Christ, a law (*lex Plaetoria*) was passed deciding that those who took fraudulent advantage of minors under twenty-five should be criminally punishable. (C. Th. 8, 12, 2.) This

remedy was too severe to be of much practical use, and accordingly we find that the law was finally determined by the edict of the Praetor, who provided a remedy more suited to the necessities of the case. The intervention of the Praetor was guided and limited by a spirit of equity. It was his object to prevent minors being taken advantage of, while avoiding the equally great danger of nullifying their legal acts, and so depriving them of the benefits, as well as the snares, of contract. (D. 4, 4, 24, 1.) We must start, therefore, with the proposition that, except in so far as the Praetor interfered, a person above the age of puberty had full legal capacity for every species of contract. Moreover, if a minor chooses to have a curator, he could not bind himself without the consent of his curator; but if such consent was given, the contract could upon no pretext be upset. (C. 2, 22, 3.) If, however, no curator was appointed, a minor could enter into any contract, and bind himself effectually, even as surety for another (D. 4, 4, 7, 3), subject to this qualification, that if an undue advantage had been taken of his youth, or by his own imprudence, without the fault of the creditor, he had unwisely contracted an obligation, he could apply to the Praetor to have the transaction rescinded (*restitutio in integrum*). (D. 4, 4, 49; D. 4, 4, 7, 1.) It was not necessary that the creditor should have taken in the minor; it was enough if the minor by his own folly had contracted an obligation that would inflict upon him serious loss. (C. 2, 22, 5 pr.; C. 2, 22, 5, 1; D. 4, 4, 44.) In considering this point, the Praetor was not tied down to the event; the question was whether, having regard to the circumstances at the time, the contract was an imprudent one. (D. 4, 4, 11, 4.) No relief was given when the minor had himself been guilty of fraud. (D. 4, 4, 9, 2.) If on attaining twenty-five a minor ratified any contract previously made by him, the contract could not be called in question. (C. 2, 46, 2.)

IV. Spendthrifts (*Prodigi*).

Spendthrifts interdicted from the management of their property are at the same time disabled from making contracts that would impair their estate. (D. 50, 17, 40.)

Fourth—EXTENSION OF INVESTITIVE FACTS—AGENCY.

A perfect type of agency implies three things—(1) that the authority of the agent is derived from the consent of the

principal; (2) that the agent can neither sue nor be sued in respect of the contracts he makes for his principal; and (3) that the principal alone can sue or be sued. If A acts for B without B's knowledge or consent, he may make himself responsible to B, but he is not an agent. If the agent alone can sue or be sued, there is no real agency. Thus in an ordinary mandate, if A asks B to buy the farm of C, and B does buy it, A cannot sue C on the contract; he can only compel B to sue C, or rather compel B to allow him to sue C in B's name. In like manner C cannot sue A the principal, but must sue B, who has in turn an action against A for indemnity. Again, if either the agent or the principal may be sued, then the agent is personally responsible for the performance of the contract, and in effect is a surety. In order, therefore, to have true agency, it is necessary that the agent should act by the authority of the principal, that the agent should be entirely irresponsible, and the principal exclusively responsible.

The early Roman law of Contracts was absolutely destitute of the notion of agency. Two reasons may be assigned for this poverty. In the first place, the rule that everything acquired by a slave or son under *potestas* belonged to the *paterfamilias*, removed to a certain extent any urgent necessity for an elastic law of agency. But, in the second place, it must be remarked that the absence of agency characterises every department of the ancient law. We have seen that no agency was admissible in the formal modes of conveying property (p. 178); we shall see that under the old forms of Civil Procedure (*legis actiones*) the principle was rigorously enforced that one freeman could not represent another. In the law of Property, agency was admitted through the doctrine of possession; in the law of Procedure attorneys or procurators were admitted through the introduction of a more flexible form of proceeding (*Formula*). The prohibition of agency is thus directly connected with the important distinction that runs throughout the whole Roman Law,—the distinction between formal and non-formal. No agency was ever admitted in the Roman Law in respect of any formal transaction; and where agency was introduced, it was by superseding the formal by a non-formal element.

It is not difficult to understand how the idea of agency or representation should appear incongruous in respect of formal transactions. The old forms of *mancipatio*, *cessio in jure*, *stipulatio*, *legis actiones*, were highly solemn and dramatic. They

possessed in the eyes of the Romans a species of sacramental efficacy. How, then, could the benefit of one of these ceremonies be given to a person that had taken no part in them, had repeated none of the sacred words, nor performed a single act in the ceremony? We can easily understand how to an old Roman it was absolutely inconceivable that the duty or right acquired through the observance of the solemn forms of law could be transferred to a person taking no share in the performance. We have now to consider the steps by which the Roman Law approached—it never reached—a true law of agency.

I. To what extent did the old law provide, within the circle of the family, a substitute for agency?

For the present purpose no distinction exists between slaves, persons under the *potestas*, wives *in manu*, and free persons *in mancipio*. To all alike the rule applies, that all rights they acquire (whether *in rem* or *in personam*) belong to the person in whose power they are.

After setting forth the kinds of obligations that arise from contract, or as if from contract, we must note this—that we can acquire not only through ourselves personally, but through those persons that are in our *potestas* [*manus* or *mancipium*]; our slaves, for instance, or sons. But between those there is a distinction. What we acquire through our slaves becomes entirely ours; but what we acquire through our children *in potestate*, as the result of an obligation, must be divided after the fashion of the distinction made by our constitution between the ownership and the usufruct of property; so that of all the advantages coming to him from the action, the father may have the usufruct, while the ownership is reserved for the son. (It is understood, of course, that the father brings his action in accordance with the division made by our recent constitution.) (J. 3, 28 pr.; G. 3, 163.)

In the case of children under the *potestas*, the disability in contracts, as it flows from, so it does not go beyond, the disability in property. To the extent to which a child is an independent proprietor, he can contract freely.

Whether it is for his master or for himself, or for his fellow-slave, or without naming any person, that a slave stipulates, what he acquires goes to his master. The same rule of law applies to children, too, in a father's *potestas*, in the cases in which they can acquire. (J. 3, 17, 1.)

Here there are two of the elements of agency, but the third is wanting. The owner alone can sue, the slave cannot: so far that agrees with the correct idea of agency. But the great difference between this case and agency is, that the acquisition takes effect by operation of law, without the knowledge or authority of the master, and even in opposition to his express command. (D. 45, 1, 62.) The slave is a

conduit-pipe, not an agent; he is a mechanical medium for transmitting rights, not an authorised agent to contract them. The slave is regarded as the mere voice of his master. (D. 45, 1, 45, pr.) This relation has sometimes been explained by the terms "unity of person:" there is a unity of person between slave and master, father and son, such as to make the act of the slave or son the act of the master or father respectively.¹ A more successful attempt at darkening counsel by words without understanding could scarcely be imagined. The word "person" has at least four distinct juridical meanings, and when we add to so equivocal a term the additional idea of "unity," ambiguity attains a climax. We had better, therefore, be content to state the rule in plain and intelligible language, as it is stated in the passage from the Institutes.

Illustrations.

A slave belonging to Titius, under the false idea that he belonged to Gaius, made a stipulation for 10 *aurei* to be paid to Gaius. Neither Titius nor Gaius can sue for the money:—not Gaius, because he is not owner; not Titius, because the stipulation has been made expressly for Gaius, to whom alone the promiser intended to bind himself. (D. 45, 3, 30.)

Stichus stipulates with Pamphilus, a freedman of his master Titius, for the usual services required from a freedman (*operae libertorum*). The stipulation is void, because these services can be due only to the patron himself. (D. 45, 3, 38.)

Stichus being ill, is abandoned by his master. He recovers, and stipulates for 1 *aureus* from Cornelius. This is void, for it does not accrue to his master, who has given him up; nor can it accrue to Stichus, who still continues a slave. (D. 45, 3, 36.)

EXCEPTION.—But when some act is one of the points in a stipulation, then in any case the person of the stipulator is a point also. If, for instance, a slave stipulates that he shall be allowed to pass on foot or drive, then it is he only that ought not to be hindered from so doing, but not his master too. (J. 3, 17, 2.)

A slave or *filiusfamilias* stipulates for 10 *aurei* or Pamphilus, "whichever he chooses." The choice is a fact, and must be made by the slave; it cannot be made by the master. (D. 45, 1, 141, pr.)

1. Separation of Bonitarian and Quiritarian ownership (*nudum jus Quiritium*).

But he that has the bare *jus Quiritium* in a slave, although he is his master, is yet understood to have less right over that property than he that has the usufruct, and than the possessor in good faith. For it is held

¹ The phrase, indeed, occurs in the Code (C. 6, 26, 11, *Cum et natura pater et filius eadem esse persona pene intelliguntur*—For by nature father and son are understood to be, one may almost say, the same person), but in a sense totally different. In that passage, it merely signifies that for certain purposes of substitution in Wills, father and son were to count as one person only.

that what the slave acquires can in no case go to him. So far is this carried, that some think that even if the slave stipulates that a thing shall be given to him by name, or accepts a thing conveyed by *mancipatio* in his name, yet nothing is acquired for him. (G. 3, 166.)

In this separation of the beneficial from the technical ownership, the slave acquired for the beneficial, not for the technical owner. The distinction itself, as we have seen, between the two kinds of ownership, was obsolete before the time of Justinian.

2. Slave held in joint-ownership.

It is certain that a slave held in joint-ownership acquires for each master according to his share. But to this there is an exception—when, namely, he acquires by stipulating for one by name; or by receiving what is conveyed by *mancipatio* for him alone, as when he stipulates thus, “Do you undertake that it shall be given to my master, Titius?” [or receives a thing conveyed by *mancipatio* thus, “This thing I assert to be the property *ex jure Quiritium* of my master, Lucius Titius, and let it be bought for him with this bronze and balance of bronze.”] (J. 3, 28, 3; G. 3, 167.)

It is questioned whether the fact that an order comes in from one of his masters has the same effect as the addition of the name of one master. Our teachers think that what is acquired goes to him alone that gave the order, just as if the slave had stipulated for him alone by name, or had received a thing by *mancipatio* for him alone. The authorities of the opposing school, however, believe that the acquisitions go to both masters, just as if no one had come in to give an order. (G. 3, 167 A.)

But if by order of one master the slave makes a stipulation, then he acquires for him alone that ordered him to do this, as has been said above. The case was formerly doubtful; but it is perfectly clear after our decision. (J. 3, 28, 3.)

If a slave held in joint-ownership makes a stipulation, he acquires for each of his masters an amount proportioned to his share as master. But if he acted by the orders of one, or stipulated for one alone by name, then to that one alone what is acquired will go. And when a slave held in joint-ownership stipulates for something that one of his masters cannot acquire, it is acquired entire for the other,—as when the thing that he stipulates shall be given belongs to one master. (J. 3, 17, 3.)

Illustrations.

Stichus is a slave of Lucius Titius and Gaius Seius, Titius having one-third share, and Seius two thirds. Stichus makes this stipulation, “Do you promise to give 12 *aurei* to Lucius Titius and Gaius Seius?” In virtue of this stipulation, Lucius Titius and Gaius Seius, being named, will each get 6 *aurei*.

Stichus.—“Do you promise to give 12 *aurei* to my masters?” In this case, as they are not named, Lucius Titius and Gaius Seius will take according to their shares—Titius 4 *aurei* and Seius 8.

Stichus.—“Do you promise to give 12 *aurei* to Lucius Titius and Gaius Seius, my masters?” Here, as the masters are named, the additional words, “my masters,” are treated as surplusage, and the two masters will divide the 12 *aurei* equally between them. (D. 45, 3, 37.)

Stichus is a slave of Julian and Cornelius. Julian allows Stichus a *peculium*. Out of that *peculium* Stichus gives a loan to Sempronius; and by stipulation, Sempronius

promises to repay the amount to Cornelius. Which is the stronger claim—that of Cornelius, who is named in the stipulation, or of Julian, whose money has been lent out? Undoubtedly Cornelius can sue on the stipulation; but he will be repelled by the plea that his demand is against good conscience (*exceptio doli mali*), that he is taking advantage of a technical right to possess himself of money really belonging to Julian. (D. 45, 3, 1, 2.)

Pamphilus is a slave of Titius and Maevius. He makes the following stipulation: "Do you promise to give 10 *aurei* to Titius within twenty days? If you do not pay that amount to Titius within the time, do you then promise 20 *aurei* to Maevius?" These are two stipulations, the first simple and unconditional; the second conditional on the non-performance of the first. Therefore Titius can sue for the 10 *aurei* as well as Maevius for the 20, after the time has elapsed. But Titius will be repelled by the (*exceptio doli mali*), and Maevius alone will be permitted to sue. (D. 45, 3, 1, 6.)

Stichus is a slave of Titius and Maevius, and stipulates thus:—"Do you promise to give Titius 10 *aurei*, or to give a farm to Maevius?" The rule is, that a stipulation is acquired for the master who is named, but here both are named in such a way as to make it impossible to determine which is entitled. The stipulation is therefore void for uncertainty. (D. 45, 3, 10; D. 45, 3, 9, 1.)

A slave belonging to two men stipulates for a right of way or other praedial servitude, without mentioning the name of either master. One of the masters has land to which such right of way or other servitude can attach; the other has not. The right of way or other servitude is acquired for the first only. (D. 45, 3, 17.)

Stichus belongs to Titius and Maevius. Maevius is about to marry, and Stichus stipulates for a dowry (*dos*). It accrues to Maevius alone. (D. 45, 3, 8.)

3. Slave or freeman *bona fide* possessed: slave held in usufruct or use.

What is acquired through freemen and slaves belonging to others, but in good faith in your possession, goes to you. But in two cases only,—when they acquire by their own toil, or by dealing with what is yours. (J. 3, 28, 1; G. 3, 164.)

What is acquired too through a slave in whom you have the usufruct or the use in like manner in those same two cases, goes to you. (J. 3, 28, 2; G. 3, 165.)

Illustrations.

Stichus, a slave having a *peculium*, falls into the possession of Maevius, who thinks himself the heir of Stichus' master. Maevius gives a loan to Titius of a part of the *peculium*, and Stichus stipulates for repayment to Maevius. Gaius, the true heir, can, notwithstanding the stipulation, recover the money lent as his own property. (D. 45, 3, 1, 1.)

A father died intestate having in his power a son Titius and a daughter Titia. Titia thought nothing was left by her father. Titius got possession of the whole inheritance, including Arethusa, a slave-girl. Titius died, leaving an infant daughter. Her *tutores* sold the grandfather's inheritance, and by their order Arethusa stipulated with the purchaser for the price. Could Titia claim any part of the benefit of that stipulation, seeing that she was jointly entitled with the infant daughter of Titius to the slave? Although Arethusa was *bona fide* possessed by the infant daughter, still, says Paul, as the property of the grandfather was common to Titia and the daughter of Titius, the whole price cannot accrue to the infant daughter; but it must be equally divided between her and Titia. (D. 45, 3, 20, 1.)

Pamphilus, a slave of Titius, is stolen by Calpurnius. Pamphilus makes stipulations on behalf of Calpurnius. These are absolutely void. They cannot accrue for a thief.

If, however, Pamphilus makes stipulations, not naming Calpurnius, Titius, as the owner of Pamphilus, will have a right to sue on them. (D. 45, 3, 14.)

4. A slave belonging to a vacant inheritance. (*Servus hereditatis jacentis*.)

A slave in virtue of his master's *persona* has the right of making a stipulation. Now an inheritance in most respects stands in the place of the deceased person. Therefore what a slave belonging to the inheritance stipulates for before the inheritance is entered on, he acquires for the inheritance; and thus it is acquired also for him that afterwards becomes heir. (J. 3, 17, pr.)

The point here settled in the affirmative by Justinian was disputed between the Proculians and Sabinians. The Proculians asserted that a stipulation made by a slave, before the entry of the heir was void, because the heir was at the time a stranger. The Sabinians got over the difficulty by the fiction, that once an heir entered, he must be regarded as succeeding his ancestor at the moment of his death. The stipulation, to be valid, must be made on behalf of the "inheritance" or the "future heir;" but if made for the person who afterwards became heir by *name*, the stipulation is void. (D. 45, 2, 16)

II. By the *jus civile* a master could not be bound by the promises of his slave. "Our slaves can better our condition, but cannot make it worse."¹ The result was that a slave could not make any contract for his master, involving reciprocal duties, as a sale or letting on hire. But he could stipulate or lend for his master. This was, however, a poor set-off to the fact that he could neither buy nor sell.

The disabilities of the slave's position were removed, partly by treating him as a principal having a capacity to contract (*actio de peculio*, *actio tributoria*), and partly by treating him as an agent to bind his master (*actio quod jussu*, *actio de in rem verso*).

If, therefore, it was by the [father's or] master's orders that the business was transacted with the son or slave, the Praetor promises an action against the master for the entire sum. For he that contracts in such a case seems to look to the master's credit. (J. 4, 7, 1; G. 4, 70.)

Again, the Praetor has set forth an action concerning the *peculium* of slaves and of *filifamilias*, and an action to try whether the plaintiff has made oath, and many others. (J. 4, 6, 8.)

The *actio de peculio* against a father or master has been framed by the Praetor, because, although by the contracts of children and slaves the parents and masters are not actually bound by the law, yet it would be only fair that they should be condemned to pay as far as the *peculium* will go; for it is, so to speak, the patrimony of sons and daughters, and of slaves also.

¹ *Melior conditio nostra per servos fieri potest, deterior fieri non potest.* (D. 50, 17, 33.)

